



## **CANADA**

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### **Overview**

Canada is a federal state of ten provinces and three territories, each of which is responsible for education within its borders. This is a common division of powers but, unlike most other federations, Canada's federal government does not exercise significant authority over education. There is no Canadian minister or department of education, no comprehensive national education policy and, with a few important exceptions, no national standards governing the establishment and operation of schools. The federal government does have constitutional responsibility for First Nations education and provides some financial support for minority and second language instructional programs, but provincial legislatures exercise exclusive jurisdiction over elementary and secondary education, subject only to conditions imposed by constitutional protections, judicial rulings and available resources. The territorial governments of Yukon, Nunavut, and the Northwest Territories have no inherent jurisdiction, their authority over education deriving from constitutive legislation passed by the Canadian (federal) Parliament. They have nevertheless developed their own education structures (or are doing so in Nunavut), which they

administer under official, essentially benevolent, federal supervision. There are thus thirteen discrete education jurisdictions in Canada, each with its own distinct system of compulsory, publicly funded, regulated, and supervised elementary and secondary schooling, and each with its own, often quite different, policies concerning non-public education.

There are commonalities across the different jurisdictions, which are largely rooted in a common history and shared geography. Public schools are largely financed through centrally administered grants funded through a combination of property taxes and general revenues, are governed and administered by local authorities responsible for defined geographic districts and are formally free. Details nonetheless vary across jurisdictions, particularly with regard to the extent of the geographical areas served and the ways schools are organized. So too with non-public education: while all jurisdictions allow children to be educated outside of the state system, there are differences in how non-public schools are regulated, and even in how they are officially regarded. The pertinent legislation in British Columbia and Saskatchewan provides for “independent” schools, for example, while that in Ontario and Alberta addresses “private” schools, and that in New Brunswick mentions neither, remaining silent on the possibility of non-state schools. Given these and many other variations it is tempting to regard education in Canada as being decentralized, but such a view can divert attention from the high levels of centralization within each of the thirteen jurisdictions, a condition which is more accurately captured by Elboim-Dror’s (1973) notion of deconcentration.

Matters are complicated further by constitutional protections for publicly operated religious and linguistic schools. Currently, the protections for religious schools only apply to Roman Catholic or Protestant minorities in Ontario, Saskatchewan and Alberta, while those provided for minority language instruction extend to all provinces and territories, but are applied differently in Quebec. In each case the differential access to public schools results in instances of asymmetrical federalism.<sup>1</sup> Less tractable geographical asymmetries concerning area, population, industry, and income also influence school variety and access. Although the three territories span 40 percent of Canada’s landmass, less than 0.5 percent of Canadians make their home there. The markedly asymmetrical population distribution across the provinces is more significant, with 93 percent of the national population residing in the six geographically largest provinces of (in order of decreasing population) Ontario, Quebec, British Columbia, Alberta, Manitoba, and Saskatchewan. Moreover, over half of all Canadians live within one of the 17 largest cities, ten of which are located in southern Ontario or Quebec. Given these settlement patterns the review which follows is primarily focused on schools and schooling in the six most populous provinces as given above.

One final asymmetry needs mention. As noted by Mark Holmes “the lack of

consistency and, in many cases, of important data makes informed provincial comparison and national discussion difficult.”<sup>2</sup> Over the past decade or so cooperation between Statistics Canada and The Council of Ministers of Education has enhanced the range and quality of internationally comparable data available, but in some important instances this advance has blurred rather than improved internal comparisons, which are inherently difficult given jurisdictional differences in structures and operational definitions. Non-public schools are a pertinent case in point. At the time of writing national level enrolment data for non-state schools by jurisdiction were not available, although they were scheduled to be released at the end of 2011.<sup>3</sup> Given this limitation efforts have been made to generate up-to-date and comparable state and non-state school statistics from data available *via* provincial and territorial Department or Ministry of Education websites and, unless otherwise noted, it should be assumed that the enrolment numbers, school counts and related statistics presented in this review were collected or calculated from such sources.

## Structure

Each of the thirteen jurisdictions has enacted a legislative framework to govern the establishment and operation of elementary and secondary schools. In all cases this legislation divides duties and responsibilities between a central (provincial/territorial) Ministry or Department of Education, and various forms of local and regional education authorities. Division of responsibilities broadly conforms to Kandel’s<sup>4</sup> classic characterization of state centralization in which school *interna*, such as admission, curriculum, finance, teacher certification, and examinations are controlled centrally, with responsibilities for operational *externa*, such as staff employment and remuneration, pupil transportation, building maintenance, equipment and supplies, being assigned to local authorities.

With the exception of the very few special purpose schools operated directly by governments, public schools are established, operated and closed by local authorities that have been assigned responsibility for defined geographical districts, usually coterminous with city or other municipal boundaries. These local authorities typically take the form of an elected board of trustees with an administrative staff. The size and complexity of the areas administered varies considerably, some rural school districts in the prairie provinces serving fewer than five thousand students distributed across a dozen or so schools spread over thousands of square kilometres, while the larger city districts serve hundreds of thousands of pupils in hundreds of schools in a much more densely settled, as well as socially and ethnically varied, milieu. Numbers of administrative staff vary accordingly, ranging from half-a-dozen or less to hundreds, although the number of elected trustees governing any district typically numbers less than twenty or so. School board elections, it should be noted, are not contested by

established political parties, candidates usually running their own campaigns, with elections focused on local issues and personalities.

Although accurate statistics are not readily available, approximately eight percent of all school aged children in Canada are currently educated outside of state schools. This relatively small proportion by comparative international standards is largely accounted for by the wide range of options available within the provincial schooling systems, especially the publicly funded Roman Catholic separate schools in Ontario, Alberta, and Saskatchewan, which account for some 15 percent of total Canadian elementary and secondary enrolment. In addition, all jurisdictions have established school boards which operate publicly funded minority language schools for eligible francophones or anglophones, these accounting for a further five percent or so of total public enrolments. Most public school districts outside of Quebec also allow parents to choose to have their children educated in a French immersion program. These have proven popular, with demand exceeding available spaces in many districts, current enrolments amounting to some eight percent of total public enrolments. Many larger urban school districts also provide access to publicly financed alternative schools and programs of various kinds.<sup>5</sup> In 2010-11 there were also some 7,800 students attending one of 19 publicly funded charter school campuses operating in Alberta, the sole Canadian jurisdiction permitting this form of school choice.

Section 93 of the Canadian constitution guarantees the continued provision of separate schools and governing boards for Roman Catholic and Protestant minorities in Ontario, Alberta, and Saskatchewan. Almost a third (30.2 percent) of Ontario elementary and secondary pupils attend such schools, which are operated by 37 Roman Catholic Separate Boards, eight of which are also French language instruction boards. There is also one Protestant Separate Board (officially designated a School Authority) operating a single elementary school, enrolling some 250 pupils in 2005-06. In 2010-11 there were 16 Roman Catholic separate boards in Alberta, enrolling a total of 127,500 pupils, as well as a further 6,500 students in 14 schools operated by the single Protestant separate board. Total 2011 Alberta separate school enrolment amounted to 23.4 percent of students in public elementary and secondary schools. Saskatchewan has the smallest number (34,250) and proportion (21 percent) of separate school students, distributed across 117 schools operated by ten boards, including a sole Protestant board enrolling less than 100 pupils in a single school. The Yukon, Northwest Territories and Nunavut Acts each provide for minority Catholic or Protestant separate schools. There were three Catholic schools in Yukon in 2011, accounting for 19 percent of total public enrolments. As is the case with all except the minority language public school in the Yukon, these three are operated directly by the Department of Education, with elected school councils providing a forum for parent advice and involvement. There is one Catholic separate board in the Northwest Territories, operating a secondary and two elementary schools. Nunavut currently has no separate schools or boards.

As discussed further in the next section, Canada's separate schools are a legacy from the country's founding. As the rise of state secularism displaced the original non-sectarian Christian character of the majority public schools with a growing official commitment to religious neutrality, social discourse and legal opinion has come to uncritically view Canada's public schools as secular institutions. This appears to imply that the separate schools in Ontario, Alberta, Saskatchewan and the Territories are not public schools: that is are not publicly funded, managed and controlled schools. This is incorrect: Canada's separate schools are an integral part of the public school systems in the jurisdictions concerned. More accurate yet cumbersome usage would distinguish between denominational separate public schools and secular public schools, but such usage would not hold for the community of St. Albert, the location of Alberta's sole Protestant school board, where the majority public board is the Greater St. Albert Catholic Schools Regional Division.

Consonant with the deconcentrated character of Canadian schooling, the separate schools and systems embody important differences. In all three provinces only members of the minority faith can elect separate board trustees. In Ontario separate board supporters must officially direct their property taxes to support separate boards, or they otherwise default to the public board, but in the districts where separate schools exist in Alberta and Saskatchewan, property taxes paid by members of the religious denominations concerned automatically support the separate schools. In Edmonton, Calgary and Saskatoon non-Catholic pupils may enrol in Catholic separate schools and Catholic children enrol in public schools at no financial cost, but in Ontario non-Catholic children are only allowed to attend Catholic elementary separate schools at the discretion of the school board concerned and are normally required to pay fees which compensate for the property taxes they are unable to direct to the separate board. Such requirements do not hold for secondary level Catholic schools in Ontario, which have been open to all students since 1985.

Prior to joining Canada in 1949, Newfoundland's distinct history had created a comprehensive denominational system of public education which, in the early 1960s, was composed of schools operated by the Roman Catholic, Anglican, United, Salvation Army, Presbyterian, Seventh Day Adventist, and Pentecostal churches. After a hard fought campaign the provincial government eventually secured a constitutional amendment which enabled it to institute a single non- denominational system in 1998.

Section 23 of the *Canadian Charter of Rights and Freedoms* provides a constitutional right to publicly funded primary and secondary instruction in the language of the English or French linguistic minority of a province, where numbers warrant. All jurisdictions have created dedicated public school boards or similar governing agencies to establish and operate minority language schools for eligible pupils. In six



provinces and each of the territories there is a single francophone board governing all French language schools in that jurisdiction. During 2010-11 numbers ranged from a single school in each of the Yukon and Nunavut, to 38 in British Columbia, 24 in Manitoba, 20 in Nova Scotia, six in Prince Edward Island, five in Newfoundland and Labrador, and two in the Northwest Territories. Provinces with larger francophone minority populations have established multiple boards with responsibility for defined geographic areas. Ontario has 12 francophone boards (eight of which are also RC separate boards) serving almost 92,000 pupils, while Alberta has five francophone regional authorities enrolling almost 6,000 pupils. New Brunswick, Canada's only officially bilingual province, established a dual school system with separate English and French sectors in 1971, each with its own central administrative department, curriculum, and assessment systems, and each with its own regional management structures. In 2011 New Brunswick's five French District Education Councils accounted for almost 30 percent of total public enrolments in that province.

French is the official and majority language in Quebec. Although the province is not currently bound by the Section 23 minority language guarantees, its *Charter of the French Language* allows a publicly funded English language education for Canadian anglophones, as discussed further in following sections. Public schools are currently operated by 60 French and nine English boards. Schools operated by the English language boards enrolled 130,000 pupils in 2006-07, representing 10.8 percent of the provincial elementary and secondary public enrolment. There were an additional 13,160 pupils enrolled in English language private schools in that year, accounting for 11.9 percent of Quebec's non-preschool and non-adult private school students.

Excluding pre-school and junior colleges (CGEPs), there were 119,300 pupils enrolled in Quebec private schools in 2006-07, accounting for 12 percent of total elementary and secondary enrolment in that province, the highest of any Canadian jurisdiction. Quebec has long had the highest level of non-public school enrolment in Canada, the proportion of the province's elementary and secondary pupils attending private schools having risen from 8.6 percent in 1988 to 12.2 percent in 2007.<sup>6</sup> Enrolment in private secondary schools is three times that in elementary schools, a pattern almost entirely accounted for by French language schools, reflecting the continued influence of the surviving classical colleges founded by religious orders. Overall, English language private schools account for some 12 percent of total private school enrolments in Quebec. Many of the English schools integrate non-subsidized elementary school sections with subsidized secondary grades.

## The legal framework

Modern Canada came into being with the proclamation of the *British North America Act, 1867*. Initially composed of only Ontario, Quebec, New Brunswick and Nova Scotia, provisions were made for future inclusion of the remaining British colonies and possessions in North America, all but one of which had joined the federation by 1905. Following a close referendum the Dominion of Newfoundland became the tenth Canadian province in 1949.

Although drafted by representatives of the emerging country, the *BNA Act* was passed by the parliament of the United Kingdom which, because of internal disagreement between representatives from Quebec and the other provinces, retained sole authority to amend Canada's constitution until it was patriated in 1982. This was accomplished through the *Canada Act, 1982* which, in addition to ending the UK parliament's residual legislative responsibilities, consolidated subsequent amendments to the original *BNA Act* into a renamed *Constitution Act, 1867* as well as the *Constitution Act 1982*, which entrenched an amending formula and the *Canadian Charter of Rights and Freedoms* into the constitution.

There are two particularly important provisions regarding education in these constitutive laws. The most fundamental is Section 93 of the renamed *Constitution Act, 1867* which, as previously touched upon, assigns exclusive legislative authority over education to the provinces and protects the continued operation of minority denominational boards and schools in the three provinces where they still exist. As also outlined earlier, Section 23 of the *Charter* guarantees minority language education rights of English or French-speaking citizens. Both sets of protections are complementary facets of the French fact in Canada's history and politics, the passage of 115 years between the entrenchment of Section 93 and Section 23 spanning a period which saw a rebalancing of the saliency of religion and language in forming and preserving French identity. Rebalancing, not displacing. As illustrated by the shared official identity of many francophone and Roman Catholic schools in Ontario and Alberta, and by the more informal religious character of francophone schools in New Brunswick and elsewhere, language and Catholicism mutually reflect and support the distinctiveness of Canada's French communities and their schools, and have done so from before Confederation.

Although Section 23 contains the only specific reference to education in the *Canadian Charter of Rights and Freedoms*, other provisions have indirect bearing. The most obvious is Section 59 which exempts Quebec from sub-section (1)a of Section 23, the major practical outcome being that while French-speaking Canadian citizens are entitled to enrol their children in a French language public school anywhere in Canada where numbers warrant, in Quebec only those anglophone parents who are

Canadian citizens and who were themselves educated in Canada in English or have at least one child who has been educated in Canada in English are entitled to enrol their children in a public English language school. Other parents have been able to send their children to English language public schools by enrolling at least one child in a non-subsidized English language private school for a year. Quebec sought to close this so-called *écoles passerelles* (bridging schools) exception in 2002, but the legislation was struck down by the Superior Court and finally quashed by the Supreme Court of Canada in 2009. New 2010 legislation extended the qualification period at *écoles passerelles* to three years and instituted a points system which is to be used by state officials to assess eligibility on a case by case basis.

Other *Charter* provisions have indirect influence on education. Section 2 guarantees the fundamental individual freedoms of conscience, religion, thought, belief, peaceful assembly and association, all of which have a bearing on the content of education and the conduct of schools, as clearly demonstrated by the *Zylberberg* and *Elgin* cases as discussed below. Judicial reasoning concerning education in those and other *Charter* cases was and will continue to be strongly influenced by Section 1, which limits the rights and freedoms set out in the *Charter* “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic country,” and by Section 27, which requires the *Charter* to be “interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” Although Canada is a signatory to the United Nations Universal Declaration of Human Rights – indeed, a Canadian, John Peters Humphrey, was the principal drafter of the document and the first Director of the UN Division of Human Rights<sup>7</sup> – the Canadian *Charter* makes no explicit mention of the right to an education, nor to a parent’s prior right to choose his or her child’s education. Section 27 nonetheless acknowledges that the contents of the *Charter* “shall not be construed as denying the existence of any other rights or freedoms that exist in Canada”. In this respect Canada’s ratification of the United Nations *Convention on the Rights of the Child* carries with it an obligation to accept the right to an education and the related provisions concerning parental choice in Sections 29 and 30. More directly, Canadian jurisprudence acknowledges the broad, but by no means absolute, right of parents to raise their children as they choose. In *B.(R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] four Supreme Court justices found that the Section 7 right to liberty in the *Charter* includes the right of a parent to care for, nurture and make fundamental decisions for a child, observing that,

While parents bear responsibilities toward their children, they must enjoy correlative rights to exercise them, given the fundamental importance of choice and personal autonomy in our society. ... This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and



because the state is ill-equipped to make such decisions itself. While the state may intervene when it considers it necessary to safeguard the child's autonomy or health, such intervention must be justified. ...

If one considers the multitude of decisions parents make daily, it is clear that in practice, state interference in order to balance the rights of parents and children will arise only in exceptional cases. The state can properly intervene in situations where parental conduct falls below the socially acceptable threshold, but in doing so it is limiting the constitutional rights of parents rather than vindicating the constitutional rights of children.<sup>8</sup>

Quebec has had its own *Charter of Human Rights and Freedoms* since 1976 which originally included the following provisions regarding education:

- 40. Every person has a right, to the extent and according to the standards provided for by law, to free public education.
- 41. Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.'
- 42. Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.

As part of the project to secularize education in Quebec Section 41 was amended in June 2005 to read as follows:

- 41. Parents or the persons acting in their stead have a right to give their children a religious and moral education in keeping with their convictions and with proper regard for their children's rights and interests.

The Quebec Charter only has effect within that province and these provisions can be overridden by the legislature, as was the case with Section 41. Further, the *Canadian Charter* is supreme and in *Gosselin v. Quebec* (2002) the Supreme Court held that a failure to respect rights declared in the Quebec *Charter* may attract a judicial declaration of violation.

Section 29 of the *Canadian Charter* explicitly declares that "Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools". The rights and privileges referred to are those in Section 93 of the

*Constitution Act 1867*, which reads as follows:

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
- (1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:
  - (2) All the Powers, Privileges and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:
  - (3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:
  - (4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section.

By granting exclusive legislative powers over education to the provinces while protecting existing legal rights concerning denominational schools, Section 93 has fueled, framed and constrained a series of political debates and judicial reviews influencing school diversity in Canada, and resulted in the denominational separate schools in Alberta, Ontario, and Saskatchewan discussed earlier. In the founding provinces religion was widely accepted as an integral part of education throughout the nineteenth century and into the twentieth, especially in rural areas, particularly those settled by homogenous groups of European immigrants. As such, early public schools characteristically embraced the religious character of the community they served, which was predominately non-Catholic Christian outside of Quebec and some scattered francophone communities elsewhere, and predominantly Roman Catholic

within Quebec. As originally conceived and implemented, publicly funded minority denominational schools not only provided a supportive milieu where children could be educated in their family faith, they provided protection from compulsory participation in public schools defined or permeated by a competing religion, while also not forcing their parents to financially support such schools through their property taxes.

At Confederation all four founding provinces had developed arrangements for accommodating adherents of the minority religion within their embryonic public schools, but only Quebec and Ontario had enacted these into law. The arrangements in those two provinces were consequently protected under Section 93(1), whereas the informal arrangements that had emerged in New Brunswick and Nova Scotia were not.

Quebec had adopted a dual school system composed of Roman Catholic and Protestant branches representing the two Christian confessions, schools for the minority being called dissentient schools. Until the extensive reforms implemented during and following the Quiet Revolution in the 1960s each of the two confessional systems controlled its own curriculum, school inspection and teacher training. Quebec replaced its confessional system with the current linguistic system after securing the 1997 amendment to the constitution that inserted Section 93A, which reads as follows: “Paragraphs (1) to (4) of section 93 do not apply to Quebec.”

A system of common and separate public schools had emerged in Ontario prior to Confederation. Under the terms of the 1863 Scott Act—which has been called the charter of denominational schools—Roman Catholics were able to establish school boards separate from those governing the common schools and to direct their property taxes to support those boards. The Scott Act accorded these separate boards the same powers as those governing the common schools, and granted them shares in legislative and municipal grants made in support of education. In return, separate schools became subject to inspection by the then Department of Public Instruction, which also assumed control over curriculum and teacher training in and for the separate schools. In addition to ensuring the continued existence of Ontario’s separate schools as provided for in the Scott Act, the application of Section 93 had the effect of perpetuating features in place at the time of the Union. The most egregious effects severely limited Ontario separate boards’ access to business property tax revenues and denied access to both legislative grants and property revenues for senior level secondary school students (Grades 11 – 13).

Redress of the secondary funding limitation was famously sought through the poetically named *Tiny Separate School Trustees v. The King* test case which, after evenly dividing the Supreme Court of Canada, was finally decided by the Judicial Committee of the Privy Council in Westminster in 1928. Following a detailed interpretation of Section 93 and a thorough review of the legislative and administrative history of state schooling in Ontario

before and after Confederation, the Privy Council decided that when Section 93 came into effect in 1867, Ontario's separate schools were a special kind of common school and thus not authorized to provide the pre-university instruction available in the grammar schools of the day. In consequence, their Lordships ruled that the Section 93 rights of Ontario's separate boards were not prejudicially affected when the legislature subsequently introduced a new high school system in 1871 which made no provision for Catholic separate schools. Their Lordship's ruling continued to deny public funding for Catholic Grade 11-13 high schools for a further half century, although Ontario did continue to fund Catholic junior level secondary enrolments (Grades 9-10), but at the elementary rather than the secondary per pupil grant rate. The practical consequences of this forced Ontario separate boards to operate and fund senior high school classes as fee-charging private schools. While Catholic communities typically subsidized these schools in various ways, substantial numbers of students were nonetheless forced to transfer into the increasingly secular state secondary schools to complete their secondary education. Moreover, these financial and organizational strictures essentially restricted Catholic secondary schools to urban locales.

In his written judgement on the *Tiny* case, Viscount Haldane went to some length to explain how the Privy Council's ruling was based on a strict legal interpretation of Section 93(1). He nonetheless observed that subsection (3) clearly contemplated the possibility of provincial legislatures establishing systems of minority denominational schooling which either did not exist when a province entered Confederation, or which provided rights and privileges beyond those in place at that time. In short, there was no constitutional impediment to the Ontario legislature—or that in any other province—funding Catholic schools— or any other kind of school—should it choose to so do. The Ontario legislature finally moved to provide equivalent funding for separate secondary schools with the passage of Bill 30 in 1985, which comfortably survived a challenge to its constitutionality in a 1987 ruling by the Supreme Court of Canada. Bill 30 amended Ontario's *Education Act* to allow Roman Catholic boards to operate and receive full equivalent grant support for integrated Grade 9-13 high schools. This extension of 'full funding', as it is often but erroneously called, was warmly welcomed at the time but brought with it restrictions on the autonomy of the Catholic high schools that have come to be regretted in some quarters. And while the new policy distributed per-pupil legislative grants equally to separate and public Boards, disparities in the administration of property taxes resulted in less than fully equal funding for separate schools. These discrepancies were largely resolved in 1997 with the passage of Bill 160—the *Education Quality Improvement Act*—which introduced broad structural reforms and centralized the administration of property taxes for education under the Ministry of Finance.

A modified but essentially parallel version of Section 93 was included as Section 22 of the *Manitoba Act 1870*, under which the Red River Settlement and associated territory became Canada's fifth province. A substantial French presence resulted in the establishment of a confessional system of public schools modelled on that in Quebec, but

substantial immigration from Ontario drastically reduced the proportion of French Catholics in the population, prompting an Anglo-Protestant dominated provincial legislature to withdraw funding from the Catholic schools in 1890. This precipitated a major constitutional crisis known as the Manitoba Schools Question. Section 93(3) [22(2) in the Manitoba Act] provides for such infringements of denominational education rights to be appealed to the Canadian government, which is empowered to pass remedial legislation under 93(4) [22(3)]. The Canadian parliament and people were deeply divided on the issues, leading to the only national election fought ostensibly over school policy. Ostensibly because the schools were only the battleground, the battle itself being fought over the religious, linguistic and cultural identities and futures of the English and French ‘founding peoples’. The incumbent conservatives lost that landmark 1897 election to Wilfrid Laurier’s Liberals who promised a new “sunny ways” compromise. The practical outcome for Manitoba’s public schools saw non- compulsory religious instruction being allowed for half-an-hour at the end of the school day and for instruction in French or another language to be allowed where ten or more students spoke that language.

On the broader political stage, the length and bitterness of the conflict over Manitoba’s schools illustrates the deep divisions between the two founding peoples that have surfaced from time to time in the unfolding of Canada’s story, typically with consequences for education policy. Over the past half-century these divisions fueled the rise of a separatist movement in Quebec, which very nearly triumphed on a 1995 referendum to secede from Canada. Separatist and other French Canadian aspirations have had profound effects on schools and schooling in Quebec, and are at the root of the asymmetrical linguistic education rights outlined earlier.

The immediate resolution of the Manitoba Schools Question preserved limited religious education rights for Catholics within a unitary public school system. Although this was a loss for the French Canadian cause in Manitoba and the nation, it helped ensure the preservation of separate schools in Alberta and Saskatchewan when they entered Confederation in 1905, and laid the groundwork for the subsequent extension of these rights to the three territories.

British Columbia joined Canada in 1871 without the long legacy of French-English tensions and compromise, and with an unitary system of non-sectarian public schools which reflected a commitment to separation of church and state which was not then embraced across Canada. In the other provinces education had been historically viewed as more of a partnership between state, church and family. Indeed, this principle animated the emergence of the denominational school compromises discussed above, as well as the multi-denominational system that became established in Newfoundland before it joined Canada in 1949.

Section 17 of the terms of Union under which Newfoundland entered Canada embodied the applicable principles of Section 93, thus protecting Newfoundland’s unique religious



schools from changes prejudicial to the rights of supporters, although various reforms were adopted in search of enhanced administrative efficiency. Adoption of the amending formula in the *Constitution Act 1982* eventually led to Section 17 being amended in 1998 to read as follows: “the Legislature shall have exclusive authority to make laws in relation to education, but shall provide for courses in religion that are not specific to a religious denomination,” thus clearing the way for Newfoundland’s long standing system of denominational state schools to be replaced with the current nondenominational system. Various religiously defined private schools were subsequently established, including Holy Cross Community School in St. Alban’s and St. Bonaventure’s College in St. John’s.

In modern times, two influential court cases significantly contributed to a *Charter* derived enforced secularism in Ontario’s non-separate public schools. In 1988 the Ontario Court of Appeal ruling on *Zylberberg et al. v. Sudbury Board of Education* struck down a long standing regulation which had authorized recitation of the Lord’s Prayer and other Christian devotions during opening and closing exercises in public schools as an unreasonable infringement on freedom of religion. Two years later in *Elgin County (Canadian Civil Liberties Association) v. Ontario [Minister of Education]* the same court ruled that another regulatory provision allowing two half-hour periods of religious instruction each week in elementary schools also violated the freedom of religion. In this case the court held that the intent of the regulation itself, as well as the school activities it authorized, indoctrinated pupils into the religious tradition of the majority, which was ruled unacceptable under the *Charter*. The court nonetheless noted that education *about* religion would be acceptable provided it did not indoctrinate into a specific faith.

Both the *Zylberberg* and *Elgin* cases brought detailed responses from the Ontario Ministry of Education. The 1993 Ministry document outlining current expectations for opening and closing exercises includes sample readings and a list of desirable values. Religious readings are deemed acceptable if precedence is not given to a single faith and if non-religiously derived moral and spiritual texts are also used. Interestingly, the Lord’s Prayer is deemed permissible provided it is read and not recited. The 1994 Ministry document on education about religion provides a bland history of religious instruction in the province’s public schools, together with a discussion of the form and content of currently acceptable education about religion. Current law is set out in Sections 27 – 29 of *Ontario Regulation 298: Operation of schools: General*. Non-separate boards may provide optional programs of education about religion if such programs promote respect for freedom of conscience and religion, provide for the study of different religious beliefs, giving primacy to none, and do not exceed one hour a week. Under section 29(3) boards may also allow “a person to conduct religious exercises or to provide instruction that includes indoctrination in a particular religion or religious belief in a school” provided this is not done under the auspices of the board, no one is required to attend, and the activities take place outside of the school’s instructional program. It is not known how many non-separate boards provide instruction about religion or allow religious instruction, but both are probably rare. Even so, *The Globe and Mail* reported that the

Toronto District Board had been allowing Friday prayers in some schools with high proportion of Muslim students.<sup>9</sup>

In these *Charter* cases and others, Ontario courts have reasoned and ruled that the province's non-separate public schools are to be secular. The precedents set by these cases, together with generally compliant legal and administrative policies in other jurisdictions, have influenced expectations and practices across the country, the constitutional amendments in Quebec and Newfoundland providing particularly momentous examples of the strength of the secularist tide. More recent opposition to a new mandatory *Ethics and Religious Culture* program in Quebec has brought the clash between secular and religious values in education into the courts, as discussed later.

These developments have led to a backlash on the part of some religious groups. As a distinguished Canadian educator observed the mandated secularization of Canada's public schools was "a sad day for the influence of parents over their children's education and a disgrace in a society that prides itself on its tolerance and multiculturalism."<sup>10</sup> It has nonetheless been uncritically welcomed by many teachers and others who "look back in horror to an age when religious training was mandatory, but have no inhibitions about the state-ordered inculcation of contemporary majoritarian values (or even those held by an expert minority)."<sup>11</sup>

## *Freedom to establish non-state schools*

Education is compulsory from five or six to sixteen, seventeen or eighteen years of age, depending on jurisdiction. In all cases the compulsory attendance requirements can be satisfied through home instruction or by attending a non- public school, but there is considerable variation in the regulatory procedures and standards in the different jurisdictions. All jurisdictions require non-public schools to be registered in some way, a requirement upheld when the Supreme Court of Canada ruled this was appropriate for even religiously based independent schools in *Jones v. The Queen*, provided the registration process respects freedom of conscience and religion in education and the principles of fundamental justice.

There has been a steady but slow increase in the numbers of children and youth being educated in non-public settings in each of the six most populous provinces, the proportional increase being amplified by declines in public school enrolments over the past decade or so.

British Columbia and Quebec are distinguished by specific legislation governing non-state schools. Quebec's 1968 *Act Respecting Private Education* came about as part of the massive modernization of education in that province during the Quiet Revolution

in the 1960s. Prior to the establishment of the modern, integrated system of public schooling brought about by those reforms, private education had long been an essential feature of Quebec's educational landscape, especially at the secondary level where ecclesiastically affiliated colleges had provided publicly subsidized access to post-secondary study. The new universal public system threatened the very existence of those revered institutions, all of which suffered substantial reductions in enrolment as families opted for the newly expanded, free public secondary schools. Fears of collapse were allayed by the preamble to 1964 legislation laying the foundations for the new state system which recognized the right of parents to choose a system of education for their children as well as the right to establish autonomous educational institutions. These rights are currently recognized in the preamble to the statute establishing Quebec's Ministry of Education which reads as follows:

... every child is entitled to the advantage of a system of education conducive to the full development of his personality; ... parents have the right to choose the institutions which, according to their convictions, ensure the greatest respect for the rights of their children;

... persons and groups are entitled to establish autonomous educational institutions and, subject to the requirements of the common welfare, to avail themselves of the administrative and financial means necessary for the pursuit of their ends.<sup>12</sup>

As noted earlier, Quebec's 1976 *Charter of Human Rights and Freedoms* also acknowledges parents' right to choose private schools for their children.

Passage of the *Act Respecting Private Education* preserved many of the established private secondary colleges by authorizing government subsidies which initially approached 80 per cent of public school instructional grants, declining to around 45 percent in recent times. In its current form the *Act* allocates extensive discretionary powers over private sector schools and postsecondary establishments to the Minister of Education, who is to be advised by an appointed *Commission consultative de l'enseignement privé* [CCEP] which exercises wide supervisory powers through a permanent administrative staff and reports independently to the legislature. All private schools are required to have a valid permit which will only be granted to schools conforming to state curriculum requirements and participating in provincial examinations. Section 12(2) further stipulates a permit applicant must demonstrate "to the Minister's satisfaction that the institution will have at its disposal the adequate human and material resources required for dispensing the educational services for which the permit is issued and sufficient financial resources for that purpose". Given that private schools must, unless exempted, teach the authorized program of studies, the CCEP has interpreted these criteria as requiring that all private school teachers must normally hold provincial qualifications. One long standing implication of

delivering the full provincial curriculum is that Quebec private schools must typically adopt an extended schedule in order to present additional curriculum content integral to their purpose.

To qualify for financial support Quebec private schools must be accredited as well as registered. Section 78 of the *Act* lists seven standards that are to be “taken into account” when granting accreditation, including “(1) the quality of the institution’s educational organization and the criteria governing the selection of the teaching and managerial personnel; ... (5) the specific contribution to be made by the institution in terms of enrichment, complementarity or diversity; ... (7) the compatibility between the institution’s objectives and the policies of the Minister or the Government.” More unequivocally Section 125 stipulates that subsidies will only be paid to schools in compliance with Quebec’s 1976 *Charter of the French Language*. This means that, as in the public schools, subsidized private schools can only provide instruction in English to students previously educated in English in Canada, or to those who have a sibling or a parent who is a Canadian citizen who was educated in English in Canada. These requirements are administered by means of eligibility certificates issued by the Ministry of Education. Under the original legislation it was possible for a certificate of eligibility to be issued to otherwise unqualified children who had completed a year in an unsubsidized English language private school in Quebec. Once one child in a family had qualified for a certificate by this route, all others in the family were eligible. In 2002 Quebec’s National Assembly sought to close this ‘loophole’ with Bill 104, which declared education obtained in an unsubsidized private school in Quebec was to be disregarded when issuing eligibility certificates. After wending its way through the appeals process this legislation was finally struck down by Canada’s Supreme Court in 2009 as an unreasonable denial of the very existence of English private schools and the reality of the education they provide. New 2010 legislation established a points system under which students will normally be required to accumulate three years of English instruction in an unsubsidized private school to qualify for a certificate of eligibility. The new system accords considerable discretion to CCEP officials when awarding points to individual students, raising the spectre of future litigation. While the new system preserves the so-called *écoles passerelles*, it also represents a qualified triumph for parental choice given that the Parti Québécois opposition advocated unconditional application of the rules in the Language Charter, which would have restricted access to private English language schools to anglophones born in Canada, as is the case in Quebec’s public schools.

Quebec has long had the highest level of non-public school enrolment in Canada, the proportion of the province’s elementary and secondary pupils attending private schools having risen from 8.6 percent in 1988 to 12.2 percent in 2007.<sup>13</sup> Enrolment in private secondary schools is three times that in elementary schools, a pattern almost entirely accounted for by French language schools, reflecting the continued influence of the surviving classical colleges founded by religious orders. Overall,

English language private schools account for some 12 percent of total non-public school enrolments in Quebec. Many of the English schools integrate non-subsidized elementary school sections with subsidized secondary grades.

In sum, while Quebec has the highest proportion of private school students in the country, the government has a firm grip on the non-public schools it permits to operate, forcing parents who choose this option to see their children studying the mandated state curriculum in its entirety. As discussed further later, even unsubsidized Christian, Jewish and Muslim private schools are required to follow the new and controversial *Ethics and Religious Culture* course which is designed to provide non-preferential descriptive accounts of religions.

British Columbia's non-public schools are regulated under the *Independent School Act* which was originally enacted in 1977 as the *School Support (Independent) Act*. Before then all private schools in British Columbia were unregulated and unfunded, although they had access to free government approved text books. The number and variety of private schools had been increasing since midcentury despite escalating costs which were a challenge to many, particularly denominational schools. Initial passage of the *School Support (Independent) Act* provided partial funding for schools agreeing to conform to provincial curriculum, staffing and other standards. This was a boon for the Catholic, protestant and other non-public schools that had long voluntarily taught the core of the provincial curriculum.

This policy was reviewed by the Sullivan Royal Commission which issued its report and recommendations on education in the province in 1988. In the course of a balanced yet succinct review of the commonly voiced arguments for and against public support of non-public schools the British Columbia Royal Commission on Education (1988) offered the illuminating sketch of the diversity of British Columbian private schools at that time:

... we listened to staunch advocates of public schooling suggest that independent schools are synonymous with elitist education, that they do not serve well the diversity of provincial learners, and that they are essentially exclusionary in character. ... Granted, ten or so of the more than 300 British Columbia independent schools emulate the curricular interests, character, and style of old world institutions. However, by far the greater number of the funded non-public schools – Roman Catholic, Evangelical, Protestant, Seventh Day Adventist, Jewish, Mennonite, Sikh, Lutheran, and Fundamentalist Christian Schools, as well as the secular Waldorf and Montessori schools – exercise considerable social reach and include in their enrolments youngsters with diverse interests and needs from a variety of ethnic backgrounds and from various parts of the social and economic spectrum. The focus on the small number of 'elitist' or 'wealthier' schools which implicitly cater to a clientele



desiring university entrance, the Commission feels, has diverted attention from the larger denominational and special needs independent school sector and the importance of fiscal support to the educational programs of such institutions.<sup>14</sup>

The Commission concluded its review and presaged its recommendations by linking diversity to choice.

In framing a perspective on the issue of support for independent schools, the Commission recognizes the importance of diversity and choice and their value as sound educational principles. At the same time, the Commission recognizes that other principles equally basic to the system should serve to balance diversity and choice – notably principles of access, equality, and accountability.

Simply put, the provincial system envisioned by the Commission should be marked by both ‘loose’ and ‘tight’ properties. It should accommodate the demand for diversity that exists in both public and non-public sectors; it should allow pupils, parents, and other participants in schooling the right to make educational choices and to provide reasonable levels of resources for them to do so; it should, at the same time, seek to promote equality of opportunity and equality of educational access for all children to the extent that it is feasible; and, it should, in the interests of children’s welfare and the common good, monitor the levels of service delivered in efficient and effective ways.<sup>15</sup>

The subsequent *Independent School Act* of 1989 amended the existing legislation in broad conformity with these principles and the specific recommendations made by the Commission. Under this statute a provincial inspectorate oversees and administers the establishment and operation all independent schools in the province. Independent schools are defined as those offering “an educational program to 10 or more school age students” that does not solely consist of religious instruction, language instruction, social or cultural activities or recreational or athletic activities.<sup>16</sup> Independent schools are free to establish programs of study consistent with their philosophy, provided they satisfy an inspector that “no program is in existence or proposed at the independent school that would, in theory or in practice, promote or foster doctrines of

- (i) racial or ethnic superiority or persecution
- (ii) religious intolerance or persecution
- (iii) social change through violent action, or

(iv) sedition.”<sup>17</sup>

Independent schools are classified into one of four categories. Group 1 schools receive provincial funding equal to half of the per-student operating grants received by their local public board. They must be operated by a non-profit authority and are required to provide instructional programs that meet provincial learning outcomes and comply with Ministry instructional time and program requirements, employ provincially certificated teachers, file regular reports, participate in the provincial testing program, satisfy all applicable municipal by-laws, be inspected every two years and undergo an external evaluation every six years. In 2010 there were 54,901 students enrolled in 252 Group 1 schools, including 6,335 students enrolled in 12 distributed learning schools, defined as those where instruction “relies primarily on indirect communication between students and teachers, including internet or other electronic-based delivery, teleconferencing or correspondence.”<sup>18</sup>

Group 2 schools must meet the same requirements as those in Group 1, but receive lower operating grants (35 percent) to compensate for higher operating costs. There were 66 Group 2 schools enrolling 14,317 students in 2010.

Group 3 schools must meet all of the common standards outlined above with the key exceptions of not being required to employ certificated teachers or to satisfy Ministry curriculum or instruction requirements. They are nonetheless required to receive a satisfactory initial evaluation by an inspector and are inspected at least once every two years. Group 3 schools receive no public funding. There were 19 Group 3 schools enrolling 544 students in 2010.

Group 4 schools primarily cater to “off-shore”, non-Canadian students seeking secondary graduation certificates for admission to university and are thus required to fully conform to applicable Ministry program requirements. Group 4 schools receive no financial support and may operate as for profit ventures, but must be bonded. There were 10 Group 4 schools enrolling 943 students in 2010.

Provincial teaching certificates are normally issued by the British Columbia College of Teachers (scheduled to be dissolved and replaced with a new government department in 2012) but under the *Independent School Act* the Inspector is authorized to issue teaching certificates to applicants who satisfy guidelines developed by an appointed Independent School Teacher Certification Committee. This provides a regulated way in which teachers who do not meet domestic qualification requirements but do satisfy specific program or philosophical emphases in Group 1 and 2 schools can become certificated.

As indicated by the summary statistics above, virtually all (98 percent) independent

schools in British Columbia receive partial public support, more than three quarters (77 percent) at the Group 1 level of 50 percent support and one-fifth at the Group 2 level of 35 percent support. The Group 3 schools accommodate less than one percent of the province's non-public enrolment and are quite small, with average enrolments of 28 pupils. Over half of British Columbia's independent schools are religiously defined, approximately 30 percent being Roman Catholic and 26 percent Protestant.

British Columbia has long had the second highest proportion of Canadian students enrolled in non-public schools, 7.9 percent attending private schools in 1988, rising to 10.8 percent in 2011.<sup>19</sup> Although Group 1, 2 and 3 schools are required to satisfy provincial outcomes as given in the provincial curriculum and conform to instructional time allocations and other operational standards, they "have freedom to address the curriculum from their own religious, cultural, philosophical or pedagogical perspectives" subject to the prohibitions quoted above.<sup>20</sup> While this provides much greater latitude for independence than is allowed in Quebec, Jean Barman (1991) has argued that by bringing all private schools under the control and regulation of the state and subordinating them to its "social and economic priorities" the 1989 *Independent School Act* ensured that "British Columbia's remaining 'private' schools were in effect legislated out of existence."<sup>21</sup>

In the remaining seven provinces and three territories non-public schools are regulated under the statutes governing public education. Largely as a consequence of the settlement of the Manitoba Schools Question as touched on earlier, Manitoba has the third highest proportion of students enrolled in non-public schools, approximately a third of which are Roman Catholic or Eastern Rite. In 2010, 7.7 percent of students attending elementary and secondary schools were enrolled in non-public schools, compared to 4.8 percent in 1989.<sup>22</sup> More than 90 percent of these students attend funded non-public schools, which are referred to as private schools in Manitoba's *Public School Act*, but usually called funded independent schools in official literature. Although they are officially recognized, non-funded independent schools are neither defined nor recognized in provincial legislation, their existence being implicitly subsumed in a reference to children deemed to be "receiving a standard of education at home or elsewhere equivalent to that provided in a public school" in the Section 242(b) protection from prosecution under the compulsory attendance provisions in *The Public School Act*. A "private school" is formally defined in the *Education Administration Act* as "any school, other than a public school, which provides a curriculum and a standard of education equivalent to that provided by the public schools, but does not include any home or place to which clause 262(b) of *The Public Schools Act* applies,"<sup>23</sup> such a place being what is referred to as non-funded independent school as discussed above.

The standards deemed appropriate to ensure educational equivalence to public schools and thus qualify for funded status are laid out in Section 60(5) of *The Public*

*Schools Act*. These include official approval of the school's core curriculum contingent on appropriate adherence to the provincial program of studies, employment of teachers and a principal who hold "valid and subsisting teaching certificates", governance by a legally incorporated Board of Directors and the presence of an elected advisory board that includes at least three parents or guardians of students. Funded independent schools are also required to participate in provincial testing, accept regular inspection, and submit appropriate reports including annual audited financial statements. Non-funded independent schools that do not satisfy these requirements are nonetheless monitored by officials from Manitoba Education, Citizenship and Youth to ensure the education provided is appropriate as required under Section 242(b). Department officials also provide support services.

There were 35 such non-funded independent schools enrolling 1,119 pupils in 2010-11, accounting for 7.5 percent of total non-public enrolment. None of these schools enrolled more than 100 students, 29 enrolling less than 50. At least 12 (34 percent) were protestant Christian and 7 Mennonite. There were also four Mennonite funded independent schools as well as two Islamic, three Jewish and at least 13 other Christian schools among the funded independent schools. Under the regulations private schools can be granted permission to modify the provincial program of study to "reflect the unique religious perspectives, cultural objectives, or values of the private school."<sup>24</sup>

New Brunswick's *Education Act* defines 'school' as "a structured learning environment through which *public* education is provided to a pupil" (emphasis added) and makes no mention of private, independent or any other kind of non-public schools. Section 16(2) nonetheless declares that "the Minister shall, on application of the parent of a child, exempt in writing the child from attending school where the Minister is satisfied that the child is under effective instruction elsewhere". Approximately 1,000 students (1.06 percent of total) receive such permission to attend some 20 non-public schools each year, all of which are currently within the anglophone sector. The Department of Education normally pre-prints application forms for families that had enrolled children in an independent school the previous year, and sends them to the school for distribution to parents to verify or modify, sign and return to the school, which then forwards the forms to the Department.<sup>25</sup> There are no official regulations or policy documents governing the establishment and operation of non-public schools. The Department of Education collects basic operational data, distributes an annual memorandum listing elements of an effective instructional program, and invites non-public schools to participate in its testing program, but non-public schools are not required to implement the provincial curriculum, employ provincially certificated teachers or conform to any other official educational expectations. The Minister will nonetheless investigate complaints or other indications which imply pupils are not receiving effective instruction and act accordingly.

Nova Scotia has a more explicit and extended set of requirements. The *Education Act* defines public and private schools separately, the latter being “a school, other than a public school, that serves school-age children and has a curriculum comparable to that provided by the public schools but does not include a home- education program.”<sup>26</sup> A subsequent section explicitly states “a private school may offer a religious-based curriculum”<sup>27</sup> and under the heading of “Right to attend private school” Section 130 declares “A child may attend a private school”. Section 113 exempts children from attending public schools if they attend private schools “operating in compliance with this Act”. Requirements for compliance are minimal unless the school applies to be recognized as providing a program meeting the requirements for a Nova Scotia high school leaving certificate, in which case the school must demonstrate it is offering appropriate courses taught by appropriately qualified teachers. Considerable latitude is allowed in comparison to other jurisdictions, applicants being able to seek approval for school specific courses different from those included in the provincial curriculum to be accepted for equivalent credit, and for teachers not holding provincial certificates to be accepted as appropriately qualified. There were 34 private schools in Nova Scotia enrolling 3,414 students in 2010-11, representing 2.6 percent of the total elementary and secondary population. While modest, the proportion of pupils being educated in Nova Scotia’s non-public schools has doubled over the past two decades.

As noted earlier, Newfoundland and Labrador secured a 1998 constitutional amendment to replace its long established system of church affiliated schools with a secular system within which provision is to be made for non- denominational religious education. Section 43 of the *Schools Act 1997* provides for persons to “establish and operate a private school in the province” on receipt of written permission from the Minister, subject to three relatively modest but open requirements as follows: (a) the use of appropriate premises, (b) “courses of instruction ... as prescribed or approved by the minister” and (c) employment of teachers holding valid provincial qualifications. Elsewhere the *Act* further stipulates that private school students are subject to provincial testing programs. Departmental statistics identified only six private schools enrolling a total of 830 students in 2009-10, representing 1.2 percent of total school enrolments. While relatively small, this proportion represents a threefold increase since 1998. Four of the six schools are religiously defined, three of these being Roman Catholic, these latter accounting for 67 percent of the total private school enrolment. One of these six establishments is essentially a privately operated public school serving a small community of workers and their families operating a large yet isolated hydro-electric generating complex in Labrador.

Prince Edward Island has half as many private schools as Newfoundland and Labrador; two of the three are protestant Christian, the other a very small cooperative



school. Together the three account for a little over one percent of the total elementary and secondary enrolment on the Island. All private schools must be licensed in accordance with the requirements set out in a regulation made under the *School Act*. The chief requirement is the provision of effective instruction, which is initially decided through assessment of a written submission including an outline of a school's goals, a description of the proposed program of study including a grade by grade course outline, and staffing plans. All teachers and administrators must be eligible for provincial certification. The Minister of Education is authorized to "inspect, annually and as often as the Minister determines is necessary, any private school, including examination of the physical facilities and course materials and the observation of classes taught by the school, and the Minister shall also have the right to administer tests to the students."<sup>28</sup>

Each of the three territories provides for non-public schools in its educational legislation, but none are currently operating. Section 19 of the Yukon *Education Act* declares that "parents may choose home schooling, private schooling or public schooling for their children", although Section 29(7) explicitly prohibits public funding of private schools. Section 29(1) provides that private schools may be operated by religious denominations and Section 29(3) provides that any official regulation "shall take into account the religious preferences of the private school." Private schools are required to be registered or accredited, to demonstrate their teachers are properly certificated, and agree to monitoring and evaluation by the Department. The North West Territories *Education Act* also states parents are entitled to choose a public, private or home education for their children,<sup>29</sup> but in this jurisdiction private schools are entitled to partial public funding equivalent to approximately 40 percent of the public rate. While private schools must be registered and offer an acceptable program of studies, neither the *Act* nor the subsidiary Regulation specifically requires adherence to the official curriculum or the employment of certificated teachers, although the Minister may require such. One requirement for registration is a statement declaring the school will not promote objectionable social doctrines which mirrors the wording in British Columbia's *Independent School Act*. A unique provision exempts private schools from offering instruction in a designated Official Language (of which there are eleven in the NWT). Nunavut's new *Education Act* contains no reference to parental choice and provides minimal requirements for the registration of private schools, which are nonetheless required to follow "a curriculum approved by the Minister" and ensure acceptable standards of student achievement.

The remaining three provinces all have substantial proportions of pupils attending publicly funded separate schools. The preamble to Alberta's *School Act* declares "parents have a right and a responsibility to make decisions respecting the education of their children" but also includes a strong commitment "to the preservation and continuation of its one publicly funded system of education through its two

dimensions: the public schools and the separate schools”. Section 28 of the *Act* nonetheless provides for registered and accredited private schools.

Registered schools must seek approval to operate and agree to regular inspections. Provided the premises satisfy all applicable health, safety and building codes and the school complies with the goals and standards for education established by the Minister and is considered to deliver acceptable levels of instruction, then it is “entitled to be registered as a private school”. In addition to meeting the standards for registration, accredited schools must be non-profit enterprises governed by an elected board, must enrol at least seven students from two or more families, teach the provincial curriculum, participate in provincial testing, and employ teachers holding valid Alberta teaching certificates but who are not necessarily eligible for participating membership in the Alberta Teachers’ Association. Schools satisfying these standards are eligible for Level 1 funding at a rate of 60 percent of public school per pupil grants. At their discretion schools can qualify for Level 2 (70 percent) funding by accepting additional accountability requirements. An official 2010 list of private schools identified 148 as holding accredited status and thus eligible for partial public funding, with only four being designated as being simply registered. From their names three of these were protestant Christian schools and one a Mennonite school. At least 57 (39 percent) of the accredited schools were protestant Christian, 18 (12 percent) were culture and language schools, two were Jewish, two Islamic, and two Sikh. Despite Alberta’s publicly funded separate schools there was also at least one accredited private school offering a traditional Catholic education. Overall Alberta’s private schools accounted for four percent of total provincial enrolment in 2010, which is a decrease from the 4.5 percent reported by Statistics Canada (2001) for 1998-99, the only such decrease in any province over that period. Even so, this apparent decline does not reflect the increased enrolment in publicly funded charter and alternative schools as discussed more fully in a subsequent section.

Section 1 of Saskatchewan’s *Education Act* defines an independent school as an institution “(i) in which instruction is provided to pupils of compulsory school age; and (ii) which is controlled and administered by a person that is not a public authority”. As in other jurisdictions all independent schools must be registered and may also be accredited. To qualify for a certificate of registration applicants are required to affirm that the facilities satisfy recognized standards, the school is governed by a properly incorporated board comprised of at least three adults from three different families, and the school will enrol pupils from at least two families. Applicants are also required to submit a statement of the school’s philosophy and goals, which is reviewed by officials. Saskatchewan’s (1991) *Independent School’s Policy Manual* stresses that the legal criterion for acceptance is that the goals of an independent school are “not inconsistent” with official provincial goals, and that the onus to demonstrate inconsistency is on Department officials. Further, Section 18(1) of *The Independent Schools Regulation* clarifies that “Each registered independent

school has the freedom to add to the goals of education for Saskatchewan and to define responsibility for their achievement among the school, the home, the church, and the community”, this requirement not being “intended to diminish or infringe on the religious conscience of the owner or operator of any registered independent school”. Section 10(1) of the Regulation requires registered independent schools to employ provincially certificated teachers, but provisions are made for otherwise qualified teachers who do not satisfy normal provincial certification requirements to be granted appropriate probationary certificates at the discretion of the Department. Accreditation requires schools to subscribe to – rather than be consistent with – the official goals of education, to implement the official curriculum, and accept supervision by the Department or local board officials. Schools may seek accreditation for one, two or all of the elementary, middle and secondary curriculum levels.

Prior to 2012 accreditation did not confer eligibility for funding, but Saskatchewan had traditionally funded what are known as historical high schools which are long established, religiously-affiliated secondary schools granted special status in recognition of their invaluable educational contributions in the province’s early years, when public secondary schools were not widely available. Since 1991 the province has also provided financial support for associate schools which are religiously-based independent schools that have entered into a joint operating agreement with a public board. Such schools must be operated by a non-profit corporation and conform to provincial curriculum policy, but they retain their freedom to educate from a philosophical perspective different from the public schools. There were ten such associated schools in 2010, accounting for almost half of the total enrolment in independent schools. In December 2011 Saskatchewan announced increasing funding for associate schools. More significantly the Minister of Education also announced a new category of qualified independent schools. This initiative will provide accredited schools with financial support equivalent to 50 percent of provincial per student funding beginning in 2012-13. Qualified independent schools will be required to employ only teachers with a Professional “A” teaching certificate, implement the Saskatchewan Curriculum, participate in the provincial accountability framework, submit to inspection and supervision, and comply with ministry policy and directives.

Overall, Saskatchewan’s independent schools enrolled 2.5 percent of all elementary and secondary students in 2010-11, as compared to 1.6 percent in 1990-91, although total enrolment has declined slightly in recent years.<sup>30</sup> The new category of qualified schools should re-establish the upward trend.

Ontario is the most populous province by far, with more than 2.2 million pupils enrolled in public and non-public schools in 2010-11, compared to 1.4 million in Quebec, 0.65 million in British Columbia and 0.59 million in Alberta. It also has the

least restrictive and least sophisticated policies toward non-public schools. Section 1(1) of Ontario's *Education Act* defines a private school as "an institution at which instruction is provided at any time between the hours of 9 a.m. and 4 p.m. on any school day for five or more pupils who are of or over compulsory school age in any of the elementary or secondary school courses of study." Section 21(2) excuses pupils from attending public schools if they are "receiving satisfactory instruction at home or elsewhere". Satisfactory instruction is not defined in the *Act* or elsewhere, although Bernard Shapiro<sup>31</sup> recommended promising wording in his Royal Commission report on private schools in the province. Section 16 of the *Act* provides that all private schools must file an annual notice of intent to operate which "shall include such particulars as the Minister may require". The required particulars are minimal as are the operational expectations outlined on the official form on which schools submit the details. A private school is expected to have common, school-wide policies on attendance, assessment and evaluation and a common procedure for reporting to parents. Private schools are also required to have open admission policies and to be open to official monitoring and inspection. Ontario does not require private schools to adhere to the provincial curriculum, although most if not all publicly declare they do; nor are private schools required to submit curricula for approval, demonstrate compatibility of goals and philosophies with those of the provincial system, or employ provincially certificated teachers. Except, that is, for private schools seeking to offer course credits for the Ontario secondary graduation diploma, in which case they must request and pay for provincial inspections and conform to any appropriate requirements. Private schools are not required to participate in provincial testing programs, but may do so for a fee. This almost total absence of prescription is accompanied by a total lack of financial support. As discussed in more detail later, a recent Conservative government introduced a tax credit for parents paying fees to private schools, but this was repealed by the successor Liberal government. Given the relative lack of official scrutiny and the absence of any per-pupil funding, enrolment data for Ontario private schools are unreliable and less than timely. We estimate of there were approximately 145,000 or more students attending almost 1,000 Ontario private schools in 2010-11, representing a little more than six percent or so of total public and non-public enrolment. There is nonetheless no doubt that Ontario private school enrolments have increased substantially over the past half-century, rising from slightly less than 2 percent in 1960, through 3.3 percent in 1990-91, to perhaps 6.7 percent in 2011. Approximately half of the students attend religiously defined private schools, including at least twenty schools offering a traditional Roman Catholic education.

## *Home education*

As noted earlier, home education in all Canadian educational jurisdictions satisfies

compulsory education requirements. Yet while the right for parents to choose to home educate their children has been protected since confederation, the regulatory framework within which home education has been delivered in Canada has varied over time and across educational jurisdictions.

As in most Western countries the first phase of modern era Canadian homeschooling was initiated by critics who questioned the correspondence between the institutional processes of schooling and the child's natural approaches to learning. Legal provision for the freedom to home educate, however, implied neither general awareness of the practice nor accessible expertise to support the practice. Thus first phase of modern homeschooling in Canada—protected by residual regulation from pioneer times—was often met with attempts to either shut down individual instances of the practice, naively subject the practice to hostile interrogation, either formally or informally, or simply marginalize the practice by regarding it as a curiosity.

The second phase homeschooling in Canada begun in the early 1980s and lasting to the mid-1990s, resulting in a comparative explosion of adherents. Homeschooling families were often dealt with by the authorities on a case by case basis, their treatment ranging from lenient to invasive. Even where provincial policies existed board by board application varied. A festering discontent emerged over the prevalence of unevenly applied vague laws and policies which resulted in many families hesitating to declare their status and be counted in official statistics. The variation in accountability measures during this phase—many of which resulted in provincial inquiries and several of which moved into the courts—could not be sustained. Combined with the increasing numbers of students that had to be somehow incorporated into the educational framework, Ministries became more invitational in their approach to homeschooling.

In contrast to the two earlier phases, the current third phase of home education in Canada is marked by normalization of the practice. From the mid to late 1990s until the present, not only were regulations and policies standardized within each province, but the aura of suspicion surrounding the practice in many provinces was lifted and Ministries conveyed an authentic desire to record how many and which families were home educating and in some jurisdictions—especially the western provinces— to offer authentic practical financial and/or resource support towards its success. An atmosphere of freedom and trust began to surround the practice as a new phase of long term reporting and standardized regulation came into place in most jurisdictions.

In the four most western provinces regulatory changes occurred in the late 1990s and early 2000s—and since then some have been further updated—resulting in each province's legislation not only mentioning home education in some form, but several also providing separate detailed regulation of the practice. For example, in Ontario a



new 2002 Ministry of Education Policy Program Memorandum<sup>32</sup> ushered in a new era of official accommodation toward home education, as did a new 2003 section of the Prince Edward Island *Education Act*.

This process of normalization has primarily moved from west to east, with Quebec and Newfoundland and Labrador remaining anomalies as both jurisdictions continue to evidence an inhospitable disposition towards home education. In Quebec some have argued that coherence with continental European educational ideals for equality rather than liberty for diversity appears to serve as inspiration. A hesitation to risk any form of parallel societies being shaped through diverse approaches to education results in a constricted view of acceptable approaches to homeschooling and thus the form of homeschooling that is tolerated is doing that which occurs at school at home.

Smith (1996) discusses how home schooling was first “recognized as an acceptable educational option within the education acts of Saskatchewan, Alberta, British Columbia, and Yukon Territory,”<sup>33</sup> with other jurisdictions simply allowing exemption from compulsory public school attendance where a child was under “efficient”, “equivalent”, “satisfactory”, or “adequate” instruction at home or elsewhere. Although they allowed for it, the statutes in those provinces did not then make specific reference to homeschooling. But over the past 15 years or so, notable changes have been made. Eleven provinces and territories now specifically recognize the option of home schooling (by some such similar name) within their statutes. Four distinctive labels are used in the respective Education or School Acts to describe the practice: “home education/home education program” (British Columbia, Alberta, Nova Scotia, Prince Edward Island, Yukon Territory), “home-based education” (Saskatchewan), “home school/ home schooling/homeschooled/home schooling program” (British Columbia, Manitoba, Quebec, Northwest Territories and Nunavut Territory), and “home instruction” (Newfoundland). These Education or School Acts not only specifically name the practice but include varying amounts of detail on its governance. Only in Ontario and New Brunswick is the practice not recognized in legislation, these two jurisdictions simply allowing for the fulfillment of compulsory attendance requirements by a student being under either “satisfactory” or “effective” instruction “elsewhere”, additional policy documents in these two provinces completing the specifications. In New Brunswick parents must annually complete an Annual Home Schooling Application Form that includes their instruction intentions regarding curriculum, assessment, field trips and resources. In Ontario educational authorities are instructed in PPM 131 to accept from parents a notification of intent to home school and are subject to conditions under which they may conduct any investigation. The gradual recognition of home schooling in the governing education legislation of all but two of Canada’s provinces and territories effectively entrenches this educational option as a legitimate choice. Furthermore, a growing number of jurisdictions have developed regulations governing the practice of home education. In general these regulations cover such issues as the responsibilities of the various

parties, the notification process, and assessment and funding arrangements, where applicable, thus increasing official recognition of the practice. In short, the practice is increasingly regarded as acceptable and no longer is viewed with suspicion.

Ontario is similar to most Canadian educational jurisdictions in that funding is not provided for home educating parents. Section 21 of the *Education Act* simply allows for “satisfactory instruction at home or elsewhere” and an official directive instructs officials to collect basic information from home educators in their school districts. Although this has not been the case in the past, the atmosphere surrounding the practice is as accepting as it is of private schooling. Freedom is given to follow the educational program of the parent’s choice. Slim accountability measures are in place. Home educators function as autonomous educators and unless evidence is presented otherwise, they are deemed to be providing satisfactory instruction. Numbers of home schooled students in the province increased steadily from 3,170 in 2005/2006 to 3,502 in 2009/2010 with the number of home schooled secondary students almost doubling in that period from 575 to 986 students.

Manitoba’s *Public School Act* is considerably more demanding than Ontario’s *Education Act*. Section 260 requires the parent or guardian of a child who is a pupil in a home school to annually notify the minister of the establishment of the home school in an approved format, providing the name and birth date of each pupil, the name of the school or school division each pupil would otherwise attend, and an outline of the education program and grade level for each pupil. The educational programs are completed according to a Notification Form Template and are typically submitted by October 1 of each year for each student. The parent or guardian is also required to provide the Minister with periodic progress reports on each pupil in the home school in January and June of each year. Every report is reviewed, processed, and filed, and in some instances feedback is provided to the parents. Students are not required to participate in any provincial or other standard forms of assessment and no funding is offered for the home education program. The latest numbers available for Manitoba indicate that home schooling enrolments have steadily increased from 1,669 students in 2004/05 to 2,126 in 2010/11. One home schooling liaison in a homeschooling regional office suggested that the increase may be due to increased bullying in schools, an increased willingness by parents to comply with the notification requirements, and an increase in the popularity of blended school and home school models of educational delivery.

The *Education Act* of the Statutes of Saskatchewan, defines home-based education as a program that is provided to a pupil between the ages of 6 and 18, that is started at the initiative of and is under the direction of the parent or the guardian of the pupil, and in which the pupil is receiving instruction at and from the home of the pupil. In striking contrast to the definition of student in the Ontario *Education Act*, the definition of pupil in the Saskatchewan Act includes a person who is receiving

instruction in a registered home-based education program. Section 157(1) of the *Act* allows that a pupil may be exempted from attendance at a school... where the pupil is receiving instruction in a registered home-based education program. The Home-based Education Program Regulations, first promulgated in 1994 and revised in 2000, specify that registration of home-based pupils will, in the first instance, be with the pupil's resident board, but if necessary may be with the Department of Education. Notification of intention to provide home-based education must be given by August 15 before instruction begins. The home-based educator is deemed to have accepted the control, direction and management of the home-education program and the responsibility for the education of the student. In what appears to be the more detailed approach to reporting, a written education plan is required as is a portfolio of student work as well as annual report of student progress. Only the portfolio need not necessarily be submitted to the authorities annually. Access to standardized testing and special needs assessments are made available. School divisions receive up to 50 percent of the regular per pupil funding amount per registered home educating student with some of the funds being redistributed to the parent through items such as books, facilities use, or waived distance learning fees. The number of students enrolled in home-based learning in Saskatchewan was 1,810 in the 2008/09 school year with modest increases to 1,940 in September 2010 and to 1,996 students by September 2011. As the province has seen recent increases in population it thus appears that the percentage of home educated students has remained constant.<sup>34</sup>

The Department of Education in Alberta claims that "school choice is a key strength of Alberta's education system...[and that] the updated Home Education Regulation (2006) ensures home education in Alberta continues to be a meaningful option for students and their parents." Section 29 of the *School Act* states that a parent of a student may provide a home education program for the student if the program meets the requirements of the regulations and is under the supervision of a board or an accredited private school. Associate school boards and associate private schools will evaluate the performance of home-educated students based on education programs planned and provided by parents. Home- educated students will be visited at least twice each year by a teacher from the associate school board or associate private school. These teachers will assess progress by reviewing samples of students' work and by observing students while they perform learning tasks. Information gathered from these visits will be shared with parents. Funding is provided for both the associate school and the parents. Student enrolment in home education in Alberta have increased slightly from 9,976 in 2007/2008 to 10,461 in 2011/2012. These numbers include home schooled students enrolled in blended programs and all are registered with Public, Separate, Francophone, Charter, Early Childhood Service Private Operators or Private School Authorities.

In British Columbia parents must enroll their home schooled child with a public school or independent school of their choice. The school is paid a nominal fee (slightly

more if it is a public school) for accepting the enrolment, maintaining contact with the family and offering evaluation and assessment services as well as instructional resources for the pupil. The number of homeschooled students *enrolled* in public and independent schools in British Columbia declined from 2,811 in 2006/07 to 2,228 in 2010/11. In contrast the number of students enrolled in Distributed Learning Programs (in which students are *registered* with a school and most of the learning takes place at a distance) increased by almost 300 percent during the same period, from 16, 876 to 49,601 students. During this period the number of students enrolled in all forms of schooling in the province decreased from 655,732 to 649,366, but independent school enrolment increased from 67,916 to 70,272.<sup>35</sup>

The Quebec *Education Act*, Article 15, states that, “a student who receives home schooling and benefits from an educational experience which, according to an evaluation made by or for the School Board, is equivalent to what is provided at school”, is exempt from compulsory attendance. If applicable, a child must have a Certificate of Eligibility for English Instruction under the *Charter of the French Language* in order to be homeschooled in English, and must be registered with a local school board. Parents must annually complete an Application Request for Home Schooling and provide a detailed Home Schooling Education outline that reflects the Quebec Education Program and demonstrates on educational experience equivalent to that provided by the School Board on or about May 31 of the year prior to home schooling. Approvals are signed contracts between the parents and the School Board. Evaluation that the child is meeting expectations by the School Board takes place on an annual basis by a teacher in the school in the student’s Board attendance zone. Students must also participate in any Ministry of Education end-of-cycle assessments. Parents must maintain a portfolio of the teaching, learning and assessment experiences during the term of the approval. Any compliance failures become legal matters. Consistent with this rigid view towards home schooling, Quebec is the only Canadian jurisdiction where recent legal action has taken place surrounding a family’s right to home educate their children.

As part of home schooling registration process in the Yukon Territory, parents are required to submit a three year education plan which includes the teaching methods and resources to be used for the subjects of literacy and numeracy. There is no requirement to provide this information for other subject areas. Home education is described by the Yukon Department of Education as one of the educational “alternatives outlined in the *Education Act*”. Section 31 gives extensive detail on the Home Education Program requirements.

Section 139 of Prince Edward Island’s *School Act* states

- (1) A parent who intends to provide a home education program for his or her child shall, before the commencement of the school year, provide the

Minister with (a) a notice of the parent's intention to provide a home education program; and (b) a copy of the proposed home education program.

- (2) The Department may provide to the parent advice and comments on the home education program.
- (3) A student attending a home education program may attend courses offered by a school board as permitted by the regulations.

The Private Schools and Home Education Regulation provides more detail, for example, on the name and address of a teacher advisor who is eligible for an instructional license under the Act and who would be available to the parent to provide advice or guidance to the parent on the child's home education program. Further details about textbooks availability and extracurricular opportunities with the school board are also given.

New Brunswick education statistics reveal that the numbers of notifying home educators in the province are remaining steady with, for example, 565 notifying students in 2007/08 and 597 in 2011/12. (Approximately 30 to 50 per year are francophone, the great majority anglophone.) In some sense the number of notifying home schooled students is surprising given that not even twice the amount are enrolled in independent schools in the province per year. In all, the province currently has approximately 102,000 students thus just over half of a percent of the New Brunswick students are home educated. The education official who shared these statistics is confident that they represent 90 to 95 percent of all home educated students in the province, so that the number of students being home educated "underground" is very small.

Canada is one of only three nations—the others being the United States of America and South Africa—that hosts a privately funded organization with fulltime lawyers on staff that serves the legal needs of home educators. Such organizations not only contribute to the protection and standardization of the practice of home education, they serve educative and support functions that contribute to the legitimization and maturation of this relatively new form of education. Thus it could be argued that statutes and policy surrounding the governance and practice of homeschooling within most Canadian jurisdictions might be regarded as unique from an international perspective. The ongoing active participation and presence of such organizations might well have contributed to exemplary, if not at minimum, satisfactory regulatory environment (in almost all provinces) within which to deliver home education. The role of such organizations may well have contributed to increasing not only public confidence in the practice of home education but also of home educators' confidence that they will be treated fairly and with respect. Even so, with the increasing confidence in the practice of home education in Canada it is hard to say whether the



modestly increasing numbers of enrolled/registered/notified home educated students in Canada simply reflects an increased comfort level with reporting or does indeed indicate an increase in the numbers of students being home educated in Canada.

Given the most recent available numbers reported above for registered home educating students in British Columbia (2,228), Alberta (10,461), Saskatchewan (1,996), Manitoba (2,126), Ontario (3,502), and New Brunswick (597), we have evidence for almost 21,000 home educating students in Canada. Imputing missing numbers for Quebec, the other three Atlantic provinces, and for the three territories, a modest estimate of registered home educated students in Canada in 2011/2012 would be 25,000. With an estimated additional unreported 10 percent of total home educating students that are not registered (a reasonable percentage proposed in conversation with a number of home education officials in various provinces), it is likely that at minimum 27,500 Canadian students are currently being home educated. While these numbers are small, and appear in no jurisdiction to exceed one percent of the student population, the choice to home educate in Canada remains a steady, if not somewhat increasingly popular, option over recent years.

### *School choice not limited by family income*

Six of Canada's thirteen education jurisdictions offer direct per-pupil financial support to non-public, child-enrolling schools that satisfy their accountability standards. Leaving aside the North West Territories, where there are currently no non-public schools in operation, the five remaining jurisdictions that currently provide public funds supporting eligible non-public schools (Alberta, British Columbia, Manitoba, Quebec and Saskatchewan) account for 54 percent of the total Canadian population, 54 percent of national Gross Domestic Product, and 63 percent of total non-public school enrolment in Canada. If Ontario—which is home to 38.7 percent of the Canadian population, accounts for 39.7 percent of national GDP and approximately 35.7 percent of all non-public school students—were to be excluded from this calculation, then the provinces that provide some direct financial support for non-public schools would account for approximately 97 percent of the total non-public school enrolment. Even after adjusting for the relatively few private schools in those provinces that do benefit from government funding, it is fair to say that if Ontario were to be excluded from consideration then some 90 percent of parents with children enrolled in Canadian non-public schools would be recognized as benefitting from partial public subsidies of the schools concerned. While this statistic may appear somewhat obscure, it gains significance when it is realized that Ontario did provide limited financial support for non-public school parents from 2001 - 2003, as discussed later.



The level of support in the five provinces currently providing direct financial support ranges from 35 to 70 per cent of the per-pupil operating grants made to public schools, with the subsidies usually being paid directly to recipient non- public schools. Various forms of ancillary financial assistance are provided by jurisdictions that do and do not provide direct support through such grants. Some jurisdictions, Prince Edward Island for example, allow private schools access to authorized textbooks on the same fee basis as public schools, while Manitoba provides an annual \$60 per-pupil grant to unfunded private schools for textbook purchases. Non-public schools also benefit from property tax exemptions and from gifts and contributions that donors can deduct from their income tax as charitable donations. While this can be viewed as a notable subsidy, public school boards, post-secondary institutions, churches and other agencies considered to contribute to the public good—including government entities— are also exempt from property taxes. Many publicly funded educational organizations (including school boards and some public schools) have established foundations or made similar provisions which allow them to benefit from tax-deductible charitable donations.

Some non-public schools also share in the modest Federal grants made to support second language instruction programs. These funds originate from the national government but are administered and distributed under agreements negotiated with each province and territory. This allows for some very minimal, indirect federal support for non-state schools in the seven jurisdictions which do not provide direct subsidies. Indirect financial assistance is also available in the form of several Federal income tax benefits. Parents with children attending non- public schools that provide religious instruction may be able to claim a charitable contribution tax credit for the portion of the tuition fee attributed to religious, as distinguished from other academic, instruction. Parents may also be able to claim a child care tax deduction for any portion of school fees charged for supervision before or after the regular school day. Recent Federal budgets have introduced two new tax credits for children enrolled in eligible fitness and arts programs. These are available to all parents of children under sixteen and are usually used to offset costs of out-of-school programs, but they do provide opportunities for non-public schools to seek tax credit eligibility for parts of their instructional programs. The new Children's Arts Tax Credit introduced in the 2011 Federal budget is particularly interesting in this regard as eligible expenses include fees for activities such as language, music, dance and visual arts instruction. Parents may claim up to \$500 of eligible expenses for each child under 16 each year, but the tax credit only amounts to 15 percent of the sum claimed. Tuition fees for children enrolled in Nursery, Junior Kindergarten and Kindergarten may also qualify as tax deductible child care expenses. Tuition fees for Nursery and Junior Kindergarten pupils are fully tax-deductible, but only 57.3 percent of Kindergarten fees are eligible.

Ontario's brief flirtation with partial funding for non-public schools extended from 2001 to 2003, but sprang from roots extending much deeper in time and which must be expected to bring forth new initiatives in the future. The immediate history begins with then Premier William Davis' 1984 announcement to the legislature that his Progressive

Conservative government intended to extend public funding to the senior grades of Roman Catholic high schools which, as discussed earlier, had continued to be operated as private schools following the final 1928 decision in the Tiny Township case. When making his announcement Davis observed that

... what we have decided to do legitimately raises questions about the place of independent schools in our province. While rights are not at issue, the diversity and quality of our society is affected and served by these schools. ... Thus, a commission of inquiry will be established by the Ministry of Education:

- to document and comment on the role of independent schools;
- to assess whether public funding, and its attendant obligations, would be desirable and could be compatible with the nature of their independence; and
- to identify possible alternative forms of governance for these schools and make recommendations for changes deemed to be appropriate.<sup>36</sup>

Bernard Shapiro was appointed the sole Commissioner and submitted his report (which includes valuable appendices reporting research undertaken for the Commission) the following year. He observed that while there was a clear constitutional obligation to fund separate schools, there were no constitutional restrictions on other kinds of schools the province might choose to fund, noting that when the constitution is read along with the

antidiscrimination provisions of The Canadian Charter of Rights and Freedoms [they] provide a strong argument for the extension of public funding to private schools [and that] the strength of this argument is increased ... by any extension of public funding to the secondary Roman Catholic schools since this appears to be more clearly an act of political will than a fulfillment of a constitutional obligation. The government is, of course, clearly entitled to exercise this political will but not on a discriminatory basis.<sup>37</sup>

Even so, Shapiro declared he did not “believe that such [non-public] schools have a right to public funding in any way commensurate with that provided to the Province’s public schools.”<sup>38</sup> He consequently recommended two forms of financial subsidy, the first a modest program of limited support for non-public schools that wished to preserve their independence, the second an associated school design which would see non-public schools negotiating agreements with public boards which would allow them to share in provincial per-pupil operating grants. The limited support option would have given non-public schools preferential opportunities to purchase or lease surplus public board facilities, allowed access to public school bussing services, and would have provided direct grants for the purchase of instructional materials. Shapiro’s associate school model was similar to that currently in place in Saskatchewan except that it would not have been

restricted to religious schools and participating schools would have been prohibited from charging tuition fees.<sup>39</sup> These recommendations were not adopted by the Liberal government in office when Shapiro presented his report.

The underlying issues lay dormant until 1992 when they were thrust back onto the public stage by *Adler v. Ontario* in which a group of Jewish and Reformed Christian parents alleged their *Charter* rights to freedom of religion, conscience and equal benefit of the law were being violated by Ontario's failure to fund private religious schools. The trial judge found the parent's equality rights had been infringed but that the discriminatory effect of the *Education Act* was a reasonable limitation under Section 1 of the *Charter*. Ontario's Court of Appeal upheld this decision in 1994 and an appeal to the Canadian Supreme Court was dismissed in 1996, the majority holding that "the appellants, given that they cannot bring themselves within the terms of s. 93's guarantees, have no claim to public funding for their schools."<sup>40</sup> Madame Justice L'Heureux-Dubé J. dissented, observing that,

The legislature creates a distinction between the appellants and others who are able to access publicly funded education in the surrounding social context. As found at trial, remaining a member of the particular religious communities in question and acting in accordance with the tenets of these faiths required that the children be educated in a manner consistent with the faith and therefore outside of the public or Roman Catholic schools. Control over the education of their children was essential to the continuation of the religious communities in question. This distinction results in the denial of the claimants' s.15 right to equal benefit of the law on the basis of their membership in an identifiable group. ... Denial of any funding to the appellants constitutes not only a financial prejudice, but also a complete non-recognition of their children's educational needs and the children's and parents' fundamental interest in the continuation of their faith. In applying s.15 in the context of the denial of funding for education to those who cannot access it for religious reasons, s.27 of the *Charter* [dealing with the preservation and enhancement of a multicultural heritage] supports a finding that the interests at stake, the preservation and continuation of the communities in question, form interests fundamental to the purposes of the *Charter*. The *Education Act* funding scheme represents a *prima facie* violation of the s.15 guarantee of equal benefit of the law<sup>41</sup>

All sources of legal recourse having been exhausted, in 1996 Arie Hollis Waldman complained to the Human Rights Committee of the United Nations that Ontario's failure to fund religious schools other than the Roman Catholic separate schools violated sections of the International Covenant on Civil and Political Rights.<sup>42</sup> Waldman specifically complained that he had paid \$14,050 in tuition fees for his children to attend Hebrew Day School, while the Roman Catholic separate schools were free. He acknowledged that this amount was reduced by a federal tax credit to \$10,810.89, but also pointed out he was

required to pay local property taxes to support state schools he did not use.<sup>43</sup> The State party (Canada as the UN member state) responded that the distinction was not between Catholic and other religious schools, but between public and private schools, since the subsidized Catholic system was “subject to state supervision” and thus part of the public system in a way that private schools were not. The State response further argued that Ontario had a legitimate interest in promoting “a tolerant society that truly protects religious freedom,” and that this goal was best served by secular public schools. “The State party argues that if it were required to fund private religious schools, this would have a detrimental impact on the public schools and hence the fostering of a tolerant, multicultural, non-discriminatory society in the province.”<sup>44</sup>

The Human Rights Committee concluded that Waldman had “sent his children to a private religious school, not because he wishes a private non-Government- dependent education for his children, but because the publicly-funded school system makes no provision for his religious denomination, whereas publicly- funded religious schools are available to members of the Roman Catholic faith.”<sup>45</sup> Providing only a secular public education was consistent with the International Covenant on Civil and Political Rights, but “if a State party chooses to provide public funding to religious schools, it should make this funding available without discrimination.”<sup>46</sup> As a result, “the State party is under the obligation to provide an effective remedy, that will eliminate this discrimination.”<sup>47</sup>

This decision has no legal force or effect but does bear moral force. According to one correspondent, Janet Ecker, the Ontario Minister of Education at the time, stated the government had “no plans to extend funding to private religious schools or to parents of children that attend such schools, and intends to adhere fully to its constitutional obligations to fund Roman Catholic schools.”<sup>48</sup>

Discontinuing funding for Catholic public education would bring Ontario into line with the United Nation’s Covenant, and this option has typically been supported by some 40–50 percent of respondents in recent public opinion polls. Perhaps curiously, there were 22 private Catholic schools among the 972 private schools in Ontario in 2010, each receiving no direct public financial support. The number of private Catholic schools has been steadily increasing over recent years implying that a growing number of Catholic parents do not consider the publicly-funded Catholic schools to be sufficiently ‘religious’, preferring to pay for an alternative education which better meets their expectations. These private Catholic schools are preponderantly elementary schools: 12 are elementary only and a further nine are elementary and secondary, while only one school is exclusively secondary. This is particularly interesting, since it can be argued that publicly-funded Catholic elementary schools have remained reasonably well-defined, while the secondary schools have changed considerably since the extension of funding which brought with it mandatory open admissions. In consequence, while the separate elementary schools continue to limit admission to at least nominally Catholic students, the student population of separate secondary schools are by no means exclusively Catholic, although

all students are normally required to participate in religious education courses. The very nature of Ontario's Catholic secondary schools has consequentially changed substantially—some would say drastically—since the extension of funding to the senior grades, encouraging many to wonder whether the influx of state money was worth the price. Elementary schools, on the other hand, have remained much more distinctively Catholic; yet this is the level where there has been most growth in the private sector.

In April 2001, less than two years after the 1999 finding of discrimination by the United Nations Human Rights Committee, then Conservative Premier Mike Harris introduced a measure to provide tax credits to parents who chose to send their children to non-public schools. Tax credits for private school tuition were to be phased in over five years, up to a maximum of 50 percent of the independent school tuition, to a limit of \$3,500. With this provision Ontario would join the five other provinces financially supporting non-public schools, but unlike the other provinces this scheme would transfer money to parents rather than schools. This partial voucher scheme was very short-lived. Harris' government had waged a lengthy, largely successful, battle to reform public education in the province which had been decried by the Liberal and New Democratic Party opposition and bitterly resisted by the teacher unions. The 2003 provincial election was won handily by the Liberals with the active support of the teacher unions and the new government immediately cancelled the tax credit retroactively, vowing to deny any future funding to private schools.

This was by no means the end of the story. In 2005 the United Nations committee revisited their original decision and issued a second report condemning Ontario for having failed to “adopt steps to eliminate discrimination on the basis of religion in the funding of schools in Ontario.”<sup>49</sup> John Tory, the aptly named new leader of the Conservative party, sought to respond to the issues in the subsequent 2007 election by promising to fund all faith-based schools provided they hired provincially licensed teachers, participated in provincial testing, taught the provincial curriculum, and accepted supervision by local public school boards. The details of the proposal involved absorbing private faith-based schools into the public system as alternative schools, in which religious content would be permitted in addition to the provincial curriculum, essentially mirroring Shapiro's original 1985 recommendation. The proposal was widely condemned by those who opposed all alternatives to public schooling, but it was also condemned by some independent school supporters and viewed with suspicion by many others on the grounds it demonstrated a fundamental misunderstanding of what faith-based schools are about. The public controversy raised by the proposal contributed to the defeat of the Conservatives.

As sketched earlier, the population affected by the funding issue is not insubstantial, and has been increasing steadily for many years. In 2010, an estimated 145,000 pupils attended 972 private schools in Ontario, representing about six percent of the total provincial student population, up from 3.7 percent in 1990. Of the 972 schools, 53 percent



offered only elementary grades, 22 offered only secondary, and 24 percent offered both. Approximately half of the schools were defined by a specific religion or denomination, including 340 Christian schools, 48 Jewish schools, and 53 Islamic schools, the latter having grown explosively in over the first decade of the new century. There were also about 190 private schools catering to specific populations, primarily special education groups, or offering on-line and/or tutorial services, the latter being another area of growth.

While there is no government funding for non-public schools in Ontario, there is a private charitable foundation which provides financial support. Children First, a project of the Fraser Institute which also operates in Alberta, provides funds to parents wishing to send their elementary-aged children to independent schools. Grants are awarded to cover half of the cost of tuition, up to a maximum of \$4,000, with no restrictions on the choice of school. In 2010, the foundation gave grants to 1,000 children, attending more than 200 Ontario independent schools. Grants are awarded based entirely on the financial need of parents, with no academic, prior achievement, or other criteria considered. The fund is limited, and if there are more applicants than grants in any given year—which is typically the case—a simple lottery is used to select families. Once a family is funded, the funding usually continues throughout the elementary years.

Saskatchewan has long funded its separate and other public schools equally. As touched on earlier the province has also funded two kinds of non-public schools— associate schools and historical high schools—and recently announced plans to fund a new category of qualified independent schools at 50 percent of the average public per capita rate beginning in the 2012-13 academic year.<sup>50</sup> Associate schools, which enrolled 2,028 of Saskatchewan's 4,088 (49.6 percent) non-public students in 2010, are funded at the same level as the public schools administered by the school division with which they are associated, but receive only the proportion of the grant amounts agreed to in the contract negotiated with the division, the balance being retained to fund services provided. The associate schools, which remain independently governed, retain the right to charge tuition and other fees. Agreements are negotiated independently between public or separate divisions and eligible non-public schools. Independent schools are eligible for funding as associate schools if they are religiously-based, governed by a non-profit board, and have been in operation for at least two years. Agreements are expected to address governance, recruitment and employment of staff, facilities, transportation, special needs pupils, curriculum and supervision. Eight of the ten associate schools operating in 2010 were Christian, the remaining two Islamic.

Saskatchewan's historical high schools are long-established, Christian affiliated schools granted special status in recognition of their significant historical contributions. They receive basic per-pupil operating grants at the same rate as public schools, but do not share in the transportation, targeted funding and other selective grants available to public schools. Only permanent resident pupils are eligible for grant support which, given that



out-of-province students make up more than half of the total enrolment in these schools, substantially reduces the overall subsidy. Historical high schools are also eligible for capital construction grants amounting to 20 percent of recognized costs. There were seven designated historical high schools operating in 2010, two of which were also associated schools and were funded as such. Total 2010 enrolment for the remaining five historical high schools was 1,185, of which 636 were resident students eligible for basic grant support. Adding together the 2,028 pupils attending associate schools and the 636 resident students enrolled in historical high schools, Saskatchewan provided partial but relatively generous financial support for some 65 percent of the province's non-public school students in 2010. Saskatchewan also funds several independently operated special-needs schools designated as alternative schools. Students are normally placed in these schools by school boards or social and justice agencies. As touched on earlier, the new category of qualified independent schools will be required to employ as classroom teachers only those with a Professional "A" provincial certificate, implement the Saskatchewan Curriculum, participate in the provincial accountability framework, permit inspection and supervision by Ministry officials or designates and comply with Ministry policy and directives. They must also be incorporated non-profit organizations and have been in operation for a minimum of two consecutive years.

Alberta also funds its public and separate schools equally, the province having made a commitment to maintaining a single publicly funded system with what it refers to as "two dimensions". Alberta also funds private schools, charter schools and alternative programs operated by public or separate boards. The province began funding private schools with a \$100 per pupil grant in 1967 which had increased to \$173 by 1973, after which funding was changed to a proportion of the foundation grants allocated to public schools. Initially, eligible private schools received a third of the foundation per-pupil amount, but this was increased at various times culminating in the current (2011) rates of 60 or 70 percent, depending on the accountability measures accepted by governing boards. Child enrolling accredited schools other than designated special education private schools and various language and culture schools are eligible for funding, accreditation requiring adherence to the provincial curriculum, employment of certificated teachers, and participation in provincial testing. To qualify for 60 percent Level 1 funding private schools must agree to regular reviews by provincial officials which include on-site visits, and to the development and maintenance of publicly posted three year plans which include test results and financial statements. The 70 percent Level 2 grants require governing boards to commit to more detailed planning and evaluation activities including participation in Alberta's quality of education accountability surveys, which are standard in all public and separate schools. A major difference is that whereas provincial reviews identify deficiencies to which Level 1 schools can respond as they choose subject to some limited follow-up, Level 2 schools are required to correct any deficiencies identified in provincial reviews. The 60 and 70 percent funding allocations are not calculated on the full range of grants available to public and separate boards: grants for student transportation, administration and socio-economic conditions are not included. Some other targeted grants are fully funded

at 100 percent of the public board amount, including grants for students with severe disabilities and registered home education students.

Since 1994 the Alberta *School Act* has authorized the establishment of charter schools, an option unique to this Canadian jurisdiction. The *Charter Schools Handbook*<sup>51</sup> available on the Alberta Education website provides a detailed account of legal requirements and the procedures to be followed by individuals or groups seeking to establish such schools. The *Handbook* describes these schools as “autonomous public schools” which “provide innovative or enhanced means of delivering education to improve student learning.”<sup>52</sup> They are autonomous in that they are governed by their own non-profit board and authorized to provide an innovative or enhanced form of education which is different from what is available in local public or separate schools. The specific nature of the education provided is described in the charter agreement proposed by the founders and approved by the Minister of Education. In addition to specifying how the school will be established, and administered the charter is expected to describe “the unique educational service the school will provide,”<sup>53</sup> present “the particular teaching philosophy, vision and purpose of the school with the goals of the school written as measurable outcomes” and describe “the improved student learning outcomes to be attained by the students.”<sup>54</sup> Alberta’s charter schools are public in that they are licensed by the Minister, are eligible for the same grants as public schools, open to all students eligible to attend public schools (even to those who do not reside locally), required to build their curriculum around the Alberta program of study, employ provincially certificated teachers, and participate in all provincial testing and accountability measures. They must also be non-religious in the sense that “they may not be affiliated with a religious faith or denomination,”<sup>55</sup> although they “may provide religious instruction and exercises under section 50 of the Act, as may any other public school.”<sup>56</sup> Section 50 of the Act permits boards to prescribe religious and patriotic instruction or exercises as they may decide within their local political environment, subject to the prohibition of religious intolerance as required by Section 3 of the Act. The *Handbook* attempts to reconcile any confusion that may remain by explaining charter schools are not “intended to replace the services offered by private religious schools.”<sup>57</sup>

In essence, then, Alberta’s charter schools are officially regarded as public rather than private schools, but they are encouraged to be—and endowed with the ability to be— independent of the educational apparatus operated by the state. As such they are clearly schools of choice that, by definition, provide an independently operated, comparably funded form of education not available in the local public schools. While they enjoy equal access to provincial operating grants, they are not eligible for public assistance with capital costs, so that facility costs must be funded through loans and donations. Nor are they permitted to charge tuition fees, although they may levy fees for instructional supplies and materials, as do public schools. To encourage financial viability a minimum enrolment at opening is set at 100 pupils, although this may be varied if considered appropriate. Even so, as Bosetti (2001) put it, Alberta’s charter schools “do not operate

on a level financial playing field with other public schools.”<sup>58</sup>

As discussed further in the following section, Alberta also allows public and separate boards to establish and operate alternative programs requested by parent or community groups. Such programs can emphasize a particular religion and are fully funded. Applicants seeking to establish a charter school must have previously made an unsuccessful attempt to establish an alternative program within their local school board, a requirement which both illustrates Alberta’s commitment to accommodating parental choice within its publicly controlled schooling system while also highlighting the

combination of independence and (non-religious) choice distinctive of this iteration of the charter school model.

There were 12 charter school authorities operating 19 school campuses in 2010, with a total enrolment of 7,800 or so elementary and secondary pupils, representing 1.3 percent of total provincial enrolment. There were 146 accredited private schools eligible for Level 1 or 2 funding in 2010 with a total enrolment of approximately 23,000, representing 3.9 percent of provincial enrolment. Taken together, the fully funded charter school and partially funded private school enrolments amounted to 5.2 percent of total provincial enrolments.

Manitoba began partial funding of non-public schools in 1990, a full century after the legislature had ended funding for Roman Catholic schools and precipitated the provincial-federal crisis known as the Manitoba Schools Question discussed previously. While the Laurier-Greenway resolution to the Question allowed limited religious and French instruction in public schools, it was widely resented by French- Catholics in Manitoba and elsewhere. Resentment deepened with the passage of the 1916 *Education Act* which eliminated French instruction in Grades 1-9 and limited the time available for religious instruction. School district consolidation in the 1960s further exacerbated matters by eliminating many of the small schools which had allowed denominationally homogeneous communities to provide religious education in their local school. The 1959 MacFarlane Royal Commission on Education had perceptively anticipated a consequent increase in demand for non-public religious schools and recommended partial public funding to a maximum of 80 percent of the provincial grant. Despite vigorous lobbying successive governments declined to adopt the Commission’s recommendations. After obtaining an encouraging legal opinion in 1985, the Catholic community petitioned the Federal Government to intervene through an interpretation of the 1895 School Question Remedial Order that implied a right to public funding for Catholic schools. This move raised the political stakes, but there was a widely shared preference for a provincial as opposed to an imposed Federal resolution. The 1988 election of a new Conservative government led to negotiations with the Manitoba Federation of Independent Schools which resulted in the 1990 “Letter of Comfort” which extended partial public funding to all approved Catholic and other independent schools and, in doing so, brought the

Manitoba School Question to a full close.

As Mrs. Vodrey, then Minister of Education and Training, explained in response to a question in the Legislature:

the letter of comfort was a mechanism to assist the province and assist the Federation of Independent Schools in coming to terms with an agreement, which avoided a court case and which, we have been led to believe, at that point would require 100 percent funding of independent schools. This agreement was reached

in order to avoid that immediate 100 percent funding and to provide a phasing up to a maximum of 80 percent on the operating side, and does not include capital.<sup>59</sup>

The initial 80 percent commitment was contentious and subsequently renegotiated in 1996 to the current (2011) equivalent of 50 percent of the net per-pupil operating costs of public boards. To be eligible for funding, schools must be in compliance with the provincial curriculum and offer all mandated compulsory courses, employ provincially certificated teachers, participate in provincial testing and comply with all pertinent regulations and policies. Independent schools—both funded and non-funded—are also eligible for \$60 per-pupil curricular materials grants. For non-funded independent schools this amount is made available as a credit for purchases made through the Manitoba Textbook Bureau, whereas funded schools receive half of the amount as cash and the balance as a credit redeemable at the Bureau. Funded independent schools are also eligible for grants for registered special education students at the same rate as are public boards. At their discretion school boards can enter into agreements with funded independent schools to provide shared service agreements providing access to established school bus routes, home economics and industrial arts instruction, and school clinicians. Eligible independent schools must meet the required standards over a three year period before qualifying for grant support.

Manitoba (2011) reported a total of 94 independent schools enrolling 14,594 pupils in September 2010, representing 7.7 percent of total provincial enrolment. The 59 funded independent schools accounted for 92.5 percent of total independent school enrolment, and seven percent of total provincial enrolment. Some of the 35 non-funded independent schools would be serving their three year qualification period preparatory to receiving funding. There were 17 Roman and Ukrainian Catholic schools among the funded independent schools, accounting for 34.5 percent of funded independent enrolment. All of these schools are located in the greater Winnipeg area and are administered by a diocesan school board. As such Manitoba's partially funded Catholic schools are more similar to parochial schools in the United States than they are to separate schools in Alberta, Ontario or Saskatchewan. There were also two Jewish, two Islamic and, judging by their names, at least four Mennonite and 14 other Christian schools among the funded independents in 2010.

British Columbia began funding independent schools in 1977. As discussed in a previous section, independent schools are classified into one of four categories, two of which receive financial support. Group 1 schools receive provincial funding equal to 50 percent of the per student operating grants received by their local public board; Group 2 schools are supported at a rate of 35 percent. Schools in both groups must meet the same accountability requirements, assignment to Group 1 or 2 depending on whether a school's operating costs exceed those of local public schools. In both cases schools must be operated by a non-profit authority and are required to employ provincially certificated teachers, participate in provincial testing, file reports and participate in regular inspections, provide programs that satisfy provincial learning goals and comply with Ministry program requirements. Grants are calculated by multiplying (1) the per-pupil operating grant amount received by the public school board serving the area in which the independent school is located, (2) the number of eligible FTE students enrolled in the school, and (3) the applicable percentage rate which, in turn, is determined by comparing an independent school's average per pupil operating costs with the local board's grant amount. Grants for independent schools which spend more per-pupil than the local public board are calculated at the 35 percent Group 2 rate, all others at the 50 percent Group 1 rate. Calculation of public boards' operating grant amounts include a range of supplementary grants recognizing enhanced instructional costs associated with unique student needs and variable salary, transportation and housing costs, with capital costs being excluded. Independent schools can charge whatever tuition fees they choose, but by basing the grant percentage factor on actual operating costs the state creates a partial defence against accusations of funding elite schools patronized by wealthy families.

In 2010, 318 of the 347 independent schools in British Columbia (92 percent) received government funding, 252 at the Group 1 level and 66 at the Group 2 level. These 318 funded independent schools enrolled 69,218 students, representing 10.7 percent of total public and non-public enrolment in 2010. Group 1 schools enrolled 54,901 and Group 2 14,317 pupils, equating to 79 percent and 21 percent of funded independent enrolment respectively. Nineteen of the 29 non-funded independent schools enrolling 544 students were classified as Group 3 schools that are not required to employ certificated teachers or satisfy provincial curriculum standards. The remaining ten schools with 943 students were Group 4 schools catering to secondary level, off-shore students.

More than a quarter of all British Columbia's non-public school students attend Catholic independent schools and a similar proportion attend other Christian schools. British Columbia's five Roman Catholic Dioceses have each established support systems providing guidance and administrative support for Catholic independent schools within their regions. Details vary but these organizations assist parishes and schools by coordinating financial, operation and personnel policies and procedures. The Catholic Independent Schools of Vancouver Archdiocese is by far the largest of these non-public



schools systems, with 49 schools, 900 teachers and some 14,000 pupils. The CISVA sets common tuition fees annually and administers common salary and benefit schedules for teachers and principals, but each school is vested in and operated by a single parish. Each school hires its own staff and, subject to approval by the parish priest, establishes and administers its own budget, which typically includes a subsidy from the parish in addition to revenues from fees and government grants.

Unlike other Canadian jurisdictions, Quebec has provided some form of financial support to private schools throughout much of its history. Funds provided prior to passage of the *Private School Act* in 1968 were distributed in a somewhat inconsistent and inequitable manner: for a time Roman Catholic classical colleges providing secondary education for boys were subsidized, for example, while those educating girls were not. Passage of the *Private Schools Act* established a statutory basis for funding all non-public schools that were recognized as being, in the wording of the original legislation, “in the public interest”. Initially the level of grant support was a remarkable 80 percent of the per pupil grant to public schools. This initial generosity preserved many of the classical colleges operated by religious orders which had provided pre-university education to generations of Catholic Quebecers, and which had been struggling to compete with the new public secondary schools and junior colleges (GEGEPs).

Private school funding was an issue in Quebec’s landmark 1976 provincial election campaign with the separatist Parti Québécois (PQ) led by René Lévesque advocating the complete elimination of government subsidies for private schools. After being swept into power with a stunning majority, Lévesque’s new government abandoned its policy of elimination in favour of reduced support and by 1990-91 grant support to private schools had fallen to 52 percent of the public school per pupil grant. Quebec separatism has been in remission since the close-run 1995 referendum and the province reverted to a Liberal government in 2003. Financial support for private schools increased somewhat over the past decade or so to stabilize around 55-60 percent of the per pupil public school grant.

Overall, Lefebvre & Merrigan<sup>60</sup> report that approximately 90 percent of primary and secondary schools are subsidized. Under current rules only accredited private schools are eligible for government subsidies. As discussed earlier, accreditation requires compliance with the *Charter of the French Language* and delivery of the provincial curriculum, the former limiting admittance to English instruction schools to anglophone Canadians and the latter requiring, in part, delivery of the secularized new Ethics and Religious Culture curriculum. Eligible private schools receive per-pupil grants to subsidize basic operating costs plus an “allocation in lieu of rental value” to cover “acquisition of furniture, equipment and tools, major repairs, and the improvement and refurbishing of buildings used for the institution’s educational projects.”<sup>61</sup> Schools may also receive various additional grants to support government priorities and/or subsidize unusual operating costs. Subsidized private schools that provide school bus transportation for their students are eligible to a share of transportation grant allocations.



Per-pupil grant amounts vary by curriculum level. In 2005-2006, the basic operational per-pupil private school grant at the pre-school level was \$3,064, at the primary level \$2,808 and the secondary level \$3,612: per-pupil grants in lieu of rental value were \$95, \$95 and \$139 respectively.<sup>62</sup> Financial reports for 2006-2008 show total government contributions accounted for 43.7 percent of total private school expenditures, with student contributions accounting for 28 percent, donations five percent, auxiliary businesses two percent and other revenues (primarily bank and investment interest and rental income) 21 percent. Subsidized private schools are prohibited from charging admission fees exceeding the basic operational per-pupil grant amount. Even so, Lefebvre and Merrigan (2009) report that only a handful of subsidized schools set tuition fees at the maximum level, the average student fee charged in 2004-2005 being 68 percent of the authorized maximum,<sup>63</sup> although fees in unsubsidized ‘elite’ schools such as Lower Canada College and Selwyn House School are much higher. As noted earlier, private secondary schools are considerably more popular than private elementary schools, a pattern unique to Quebec. Further, a high proportion of Quebec’s non-public schools are concentrated in and around Montreal. An eminent student of Quebec’s private school sector commented on their religious variety as follows:

Inexplicably, Ministry of Education data are silent with respect to the denominational character of private schools. However, it is common knowledge that many French-language institutions have Roman Catholic ties. For example, of the 100 private secondary schools belonging to the Association des institutions d’enseignement secondaire (AIES), 64 of them are governed by diocesan clergy or religious communities.<sup>64</sup>

### *School distinctiveness protected by law and policy*

While the Section 93 protections for “any Right or Privileges with respect to Denominational Schools” enjoyed by “any Class of Persons” appear to guarantee religious distinctiveness, the guarantees conferred are limited in various ways. First and most unequivocally this protection has never applied to the five provinces where denominational distinctiveness was not enshrined in law at the time of confederation. Various kinds of public supported religious schools had existed in New Brunswick and Nova Scotia prior to 1867, for instance, but because their status was not codified into law when these two original confederation partners entered the union, these schools did not survive. The more dramatic curtailment of Roman Catholic schools in Manitoba as discussed earlier provides a more draconian example of the historical limitations of the Section 93 protections, as does the limitation of Catholic secondary schools in the wake of the Tiny Township decision in Ontario. In more modern times the 1997 constitutional amendments gained by Quebec and Newfoundland to free

their governments from the constraints imposed by Section 93 illustrate how coordination of political interests and public sentiments can mobilize the support needed to revoke even constitutional guarantees. In each case the changes wrought were significant. Prior to the amendments five—fully half—of Canada’s provinces representing 77 percent of the national population had state funded, regulated and legitimated denominational schools, whereas nowadays such schools are present in only three of Canada’s ten provinces accounting for 53 percent of the population. Newfoundland’s 1997 constitutional amendment replaced public schools characterized by religious diversity with bland, secular, uniformity, while Quebec’s amendment relegated religious distinctiveness to non-state schools.

Even so, the courts have consistently interpreted Section 93 in ways that have protected the distinctiveness of publicly funded and governed denominational schools where and when the protections applied. Moreover, the legal reasoning and rulings supporting the constitutionality of Ontario’s 1985 decision to extend funding to senior high school grades in Roman Catholic separate schools unequivocally upheld a provincial government’s powers to extend greater rights and privileges to minority denominational schools should it choose to so do—as the Privy council had recognized in its 1928 ruling that had restricted funding to Grades 1-10. In a less obvious way, the prospect of a legal challenge invoking a retrospective reinterpretation of Section 93 protections for francophone- Catholic public schools in Manitoba was apparently decisive in encouraging the government to adopt the current partial funding arrangements for non-public schools, as illustrated by Mrs. Vodrey’s 1992 statement to the Legislature quoted earlier.

Prior to the adoption of Canada’s *Charter of Human Rights and Freedoms* rights to French or English language education were implicitly and only loosely protected through the shared identity of religion and language, especially in Quebec. Although various developments in the 1970s gave increasing prominence to the issue of minority language education rights, the Section 23 *Charter* right to a public funded primary and secondary education in the language of the English or French minority added a new form of school distinctiveness to Canada’s educational landscape. As discussed earlier, Section 23 does not yet apply fully to Quebec, so that the protections for school distinctiveness that emerged apply primarily to francophone schools outside of Quebec.

The *Charter* right granted in Section 23 “applies wherever ... the number or children who have such a right is sufficient to warrant to them out of public funds of minority language instruction.”<sup>65</sup> In its unanimous 1990 ruling in *Mahé v. Alberta* the Supreme Court declared “Section 23 encompasses a ‘sliding scale’ of requirements ... [which] guarantees whatever type and level of rights and services is appropriate under s. 23 in order to provide minority language instruction for the particular number of students involved”. “What is essential”, continued the court,

is that the minority language group have control over those aspects of education which pertain to or have an effect upon their language and culture. So, where the number of s. 23 students does not warrant granting an independent school board (the maximum level of management and control), but is significant enough to warrant moving towards the upper level of the sliding scale, it may be sufficient to require linguistic minority representation on an existing school board. In this latter case: (1) the representation of the linguistic minority on local boards or other public authorities which administer minority language instruction or facilities should be guaranteed; (2) the number of minority language representatives on the board should be, at a minimum, proportional to the number of minority language students in the school district, i.e., the number of minority language students for whom the board is responsible; (3) the minority language representatives should have exclusive authority to make decisions relating to the minority language instruction and facilities, including: (a) expenditures of funds provided for such instruction and facilities; (b) appointment and direction of those responsible for the administration of such instruction and facilities; (c) establishment of programs of instruction; (d) recruitment and assignment of teachers and other personnel; and (e) the making of agreements for education and services for minority language pupils.<sup>66</sup>

This quite sweeping interpretation resulted in a series of extensive modifications to provincial and territorial education laws to provide francophone communities with meaningful control over the character of their schools, modifications which generated various levels of political opposition in different anglophone provinces. Because *Mahé* concerned the francophone community in the relatively large city of Edmonton, the court's ruling did not specifically address the quantitative aspect of the "where numbers warrant" issue, but this was unavoidable in the 2000 Supreme Court decision in *Arsenault-Cameron v. Prince Edward Island* which turned on the nature of the education the province was obligated to provide for the 59 francophone students residing in the small city of Summerside (population 14,654 in 2001). The province contended it could satisfy Section 23 by transporting the students to an existing French language school, the average bus journey being 57 minutes. In deciding in favour of the francophone appellants the court noted the Minister of Education had failed to allow for increases in enrolment that could follow establishment of a French language school, and had also

failed to recognize that the s. 23 children were faced with a choice between a locally accessible school in the majority language and a less accessible school in the minority language, a choice which would have an impact on the assimilation of the minority language children.<sup>67</sup>

Taken together the *Mahé* and *Arsenault-Cameron* rulings not only served to strongly protect the distinctiveness of second language instructional education in Canada, they have facilitated the establishment of well-appointed schools in relatively small francophone enclaves. A recent case in point is the 2011 ruling of Yukon Supreme Court which requires the government to build a new high school for the territory's only school board, which was established specifically to govern and manage education for Section 23 children. The Commission scolaire francophone du Yukon currently educates some 184 students in its sole elementary school: the new secondary school will likely enroll less than 50 students.<sup>68</sup> The government has

appealed the decision alleging bias on behalf of the presiding judge, who once served as president of an Alberta francophone board.

In the policy realm, at least five provinces have official statements in legislation or policy documents recognizing the legitimacy of non-public education options which offer at least implicit protection for school distinctiveness. Educational legislation in British Columbia and Alberta commits each province to maintaining a strong public education system, but it also includes statements recognizing the importance of parental choice and educational diversity. Saskatchewan's *Independent Schools Policy Manual* (1991) contains the following statement:

Independent schools have the right to exist in Canada. Churches, denominations, and religious societies have an authority separate from the state to operate schools, not always in complete accordance with public education practices.<sup>69</sup>

Christian programs. This diversity of choice dates from the early 1970s when the Edmonton public board began responding to requests from parent groups by establishing alternative schools tailored to their specific preferences. The first alternative programs included a Talmud school (officially listed as a language and culture program), a fine arts program, a Waldorf school and a program for Cree language speaking children. The board decided to allow faith-based alternatives in 1996. This was primarily in response to parental demand, but public debate surrounding the development of Alberta's non-religious charter schools was influential. The first faith-based alternative program, Logos, was so successful that two well-established private Christian schools thereafter joined the public system as alternative programs.

A different pattern emerged in Calgary, Alberta's other large city, where the development of alternative programs has been much more limited. Distinctively faith-based alternatives were forbidden by the public board, but alternative schools were allowed to provide religious instruction outside of the regular curriculum. This, of course, was unsatisfactory to many parents, since the essence of a faith-based

education is that faith informs all aspects of teaching and learning and cannot be relegated to “after hours”. The ensuing controversy generated intense political wrangles, with trustees campaigning—and winning election— with the declared intent of abolishing faith-based alternatives within the public system. As of 2011, Calgary has a wide variety of alternative programs, but none are faith- based.

Public alternative programs do exist in other provinces, but generally only in small numbers, and larger urban large centres.<sup>70</sup> Saskatchewan’s ten associate schools are perhaps the most obvious, but there are others. Most large boards in Ontario, for example, offer fine arts school and various alternative programs for at-risk students. Occasionally a high-profile alternative, such as a recently established program for black students in Toronto, excites much media attention, but alternative programs are usually quietly introduced and many existing programs are usually not well known. The First Nations School of Toronto, the board’s first alternative school opened in 1977, for example , and the Toronto public board currently operates some 100 alternative and specialized programs of varying sizes but minimal publicity. There are a few faith based—or at least affiliated – alternative programs operating under the aegis of a public authority elsewhere in Canada, but outside of Alberta and Saskatchewan this form of school distinctiveness is almost exclusively the domain of non-public authorities.

## *Decisions about admitting pupils*

Discrimination is broadly forbidden under the *Charter*, but the Section 93 protection for rights and privileges of denominational schools allows Roman Catholic separate schools to restrict admittance to baptized children and members of a church in union with the See of Rome, usually understood as including Greek, Ukrainian and other Eastern rites. As a consequence of the extension of public funding to Catholic secondary schools in Ontario as discussed previously, those schools are required to admit all resident pupils who choose to attend on the understanding they will participate in mandatory religion courses and respect the Catholic religion. This is not the case in Ontario’s elementary (K-8) separate schools where admittance is usually restricted to children baptized in the faith or members of a recognized church. Nevertheless, separate boards can and do admit other students on a case-by-case basis when requested, but because non- Catholics are not allowed to direct their property taxes to support separate schools in Ontario, the parents are usually required to pay a fee to compensate for the lost revenue.

Open admittance to Ontario’s separate secondary schools has undoubtedly diluted their religious identity, spirit and distinctiveness—to the point of irrelevance in the view of some. Even so, non-Catholic pupils continue to enrol in these schools



primarily because their parents believe these schools have more disciplined academic and social cultures. In response to the diluted religious character of these publicly funded Catholic schools more independent, non-publically funded Catholic schools have been established over the past decade or so. Interestingly, though, most of these have been elementary rather than secondary schools.

Resident pupils baptised in the Roman Catholic and associated churches have a right to enrol in separate schools in Alberta and Saskatchewan, but these school also accept other pupils subject to space, program suitability and a commitment to respect the religious identity and character of the school. When public funding was originally extended to various faith-based alternative schools by the Calgary public board, those schools were required to admit any pupils, and were only allowed to provide religious instruction at certain times, and could not make it compulsory. In contrast, the Edmonton public board which, as discussed earlier, has an extensive range of alternative schools, operates various explicitly religious alternatives within the public system.

There are some indications that provincial policies that subsidize non-public schools result in a higher proportion of low-income children attending these schools, as could be expected. “Canadian experience shows that lower-income families are as likely or more likely to take advantage of independent schooling when a public subsidy is available. ... remarkably, children from better-off western families were three percent *less* likely to send their children to independent schools,”<sup>71</sup> presumably because they lived in affluent residential communities with good public schools. The obvious inference is that such public funding promotes equal educational opportunity.

## *Decisions about staff*

As a general rule non-public schools receiving public funding are usually required to employ teachers holding officially approved qualifications, but where there are no public subsidies, there are usually no such requirements. Hence, while teachers in British Columbia’s funded independent schools (Groups 1 & 2) are required to hold provincial certification, those employed in the unfunded Group 3 and 4 school do not need to be so qualified, unless a Group 4 school wishes to offer the province’s high school graduation certificate, and similar provisions hold in other jurisdictions. Even so, provisions exist for teachers in independent schools who do not meet provincial qualification requirements to obtain acceptable certification on the basis of specialist qualifications obtained elsewhere, such as Montessori or specialist arts training. Ontario, which provides no public funding to independent schools, has no qualification requirements except, again, in the case of secondary schools wishing to



offer credits toward provincial secondary school graduation certificates. Even so, non-public schools in Ontario and other Canadian jurisdictions often choose to hire teachers with provincial teaching qualifications, while also providing appropriate preference to qualifications consistent with the philosophy of the school (such as Waldorf training or qualifications from a Christian university).

Canada has strong protections against discrimination on the basis of the race, religious beliefs, colour, gender, physical or mental disabilities, age, ancestry or place of origin and sexual orientation, both in the *Charter* and human rights legislation. Nonetheless, the *Canadian Human Rights Act* and similar provincial statutes allow employers to hire selectively for *bona fide* reasons of identity or mission.

The central legal case in the education sector is the Supreme Court's decision in *Caldwell et al. v. Stuart et al.* (1984). Margaret Caldwell had been employed by the Catholic Public Schools of Vancouver Archdiocese, but her contract was not renewed after she married a divorced man in a civil ceremony. The court ruled that this was allowable under the British Columbia Human Rights Code, observing

... the Catholic school is different from the public school. In addition to the ordinary academic program, a religious element which determines the true nature and character of the institution is present in the Catholic school. To carry out the purposes of the school, full effect must be given to this aspect of its nature and teachers are required to observe and comply with the religious standards and to be examples in the manner of their behaviour in the school so that students see in practice the application of the principles of the Church on a daily basis and thereby receive what is called a Catholic education. Fulfillment of these purposes requires that Catholics observe the Church's rules regarding marriage. It must be celebrated in the Church and the marriage of divorced persons is not recognized. The Board found that Mrs. Caldwell knew this when she was employed, that inquiries were made respecting these matters before she was hired to insure her eligibility for employment in this respect. It was therefore open to the Board to find that when Mrs. Caldwell in contravention of the Church's requirements married a divorced man in a civil ceremony, she deprived herself of a *bona fide* qualification for the employment.<sup>72</sup>

Interestingly, the Catholic school in this case was part of the Catholic Public Schools of Vancouver Archdiocese, and thus a Group 1 category independent school rather than a separate school. Still, the crucial issue in this and similar cases is whether the discrimination is a *bona fide* requirement. The test for this, the court observed, has

both subjective and objective branches, the first concerning whether the discriminatory requirement was established honestly, in good faith and with a sincere belief that it is necessary for the work in question to be conducted properly; the second whether the grounds for a selective hiring or dismissal are reasonably necessary to secure the objectives of the enterprise. The importance of satisfying the objective standard was illustrated in a 2000 decision of the Ontario Superior Court which hinged upon the clarity with which employment expectations were articulated to staff. An employee of Christian Horizons, a large provider of residential and support services to the disabled, was dismissed for living in a same-sex, common-law relationship. The employee claimed discrimination to an Ontario Human Rights Tribunal arguing her lifestyle was acceptably Christian, producing Christian authorities to support her point. After hearing depositions from many interested groups, including Catholic Bishops and evangelical organizations, the Ontario Superior Court ruled that religious organization do have the right selectively hire and fire under the province's human rights code, but must clearly establish reasonable and specific requirements that are properly articulated to prospective employees.

In Alberta, where a number of previously private schools opted to become alternative schools within public boards, the right to require religious conformity has caused problems. The Logos School in Calgary (discussed above) required that teachers "affirm their active membership within a Christian church, and acceptance of the creedal (Apostles' and Nicene Creeds) basis of the Christian faith." This requirement, essential to the definition of the school, was nonetheless unacceptable to a newly elected Calgary public board which cancelled their contract with Logos.<sup>73</sup> Selection of principals was another challenge. In the case of the Edmonton Christian School, already in existence for fifty years, the agreement under which it was integrated into the public system specified that the principal would be hired by the superintendent of the public system, who would consult with the Edmonton Society for Christian Education Board, and must be bound by the school's definition, whether or not he or she agreed with this.

### *Accountability for school quality*

As in the United States, there has been a difference of opinion in Canada between professional educators and the broader public with regard to the quality of (public) schooling provided and the means of assessing that quality. This difference was illustrated by Holmes's (1998) Ontario survey which found that "while only 11 per cent of directors of education agreed with annual achievement testing of elementary students, the proposal was supported by 59 per cent of a similarly educated

comparison group of non-educators.”<sup>74</sup> Moves by provincial governments to introduce provincial testing and standards over recent decades have not been popular within the educational establishments. As with all other aspects of education policy and practice, different jurisdictions have adopted different approaches and techniques, with varying degrees of rigour and success and, although the Canadian Council of Ministers of Education has encouraged provinces to participate in international comparisons such as PISA, there are no national educational standards or examinations, and no prospects of such in the future.

As would be expected, the extent to which each jurisdiction requires non-public schools to participate in its assessments programs and conform to its educational standards varies considerably. As a general rule access to public funding depends on a non-public school participating in a province’s pupil testing program. Some provinces require non-public schools to demonstrate acceptance of official educational goals and to submit to inspection, but others do not, as discussed in more detail earlier. Alberta goes several steps further requiring its charter and funded independent schools to participate in its school accountability program which includes publication of test results and improvement plans and regular reviews.

## *Teaching of values*

In his wide-ranging criticism of the vague standards bedeviling Canadian education and, in particular, its failure to accurately reflect the true diversity of Canadian society, Mark Holmes (1998) does not spare the way in which the schools approach questions of deeply-held values. While conceding that this partially reflects a failure of broader cultural agencies and actors to address such matters, Holmes argues “the values of the larger society . . . should not be imposed on children by the power of the state against the will of their parents.” Nor, he insists, is the claim of value-neutrality often made by and for the public sector at all credible given the threats its quasi-monopolistic position creates:

It is wrong for the state to determine, deliberately or not, that young children should be raised, for example, on the basis of high self-concept and the pursuit of personal self-fulfillment in a morally and socially permissive . . . climate, unless there is a clear consensual support for these values.<sup>75</sup>

The only way out of this dilemma, and the only way to ensure that schools can operate with a clear and distinctive mission, Holmes insists, is to allow for parental choice among state-supported schools. “An important part of the problem facing schools today is simply that people want different and sometimes contradictory things, with the result that

teachers face vague ambiguity and high-minded platitudes from the bureaucracies they serve.”<sup>76</sup>

When it comes to values and worldviews, it is less problematic for governments to mandate what should not be taught in their quasi-monopolistic schools than to mandate what should be taught. A good example is found in the Alberta *School Act*, where Section 2.01 (which applies to all schools), states

- (1) All education programs offered and instructional materials used must reflect the diverse nature and heritage of society in Alberta, promote understanding and respect for others and honour and respect the common values and beliefs of Albertans.
- (2) For greater certainty, education programs and instructional materials referred to in subsection (1) must not promote or foster doctrines of racial or ethnic superiority or persecution, religious intolerance or persecution, social change through violent action or disobedience of laws.

Even so, and as we have seen, publicly financed and governed schools in Alberta may include religiously-based alternative programs as well as non-religious emphases.

In 2002 Canada’s Supreme Court rendered a long awaited decision in *Chamberlain v. Surrey School District No. 36*, ruling against a decision by the Surrey, British Columbia, public school board that had denied the use of books portraying same sex parent families in lower primary classes. James Chamberlain, a primary level teacher employed by the board, had requested permission to use three books portraying same-sex families in his Kindergarten and Grade 1 classes. The Board declined permission by a 4-2 vote and Chamberlain, with the support of the Civil Liberties Association and a gay advocacy group, challenged the decision in court. The trial judge upheld the school board’s decision, which was subsequently quashed by the BC Supreme Court and then reinstated by the Court of Appeal.

The trial judge found the Board had concluded the books would “engender controversy in light of some parents’ religious objections to the morality of same-sex relationships”. The judge further noted that the provincial curriculum objectives could be achieved without use of the books and that books’ content was not age appropriate.<sup>77</sup>

Although the case had been initially been framed as turning on Charter rights and the lower courts had indeed treated it as such, the ultimate ruling from Canada’s Supreme Court relied on administrative law principles, observing “The *School Act*’s insistence on secularism and nondiscrimination lies at the heart of this case.”<sup>78</sup> The court reasoned that

The Board was authorized to approve or not to approve books for classroom use.

But its authority is limited by the requirements in s. 76 of the *School Act* to conduct schools on “strictly secular and nonsectarian principles” and to inculcate “the highest morality” while avoiding the teaching of any “religious dogma or creed”. The words “secular” and “nonsectarian” in the Act imply that no single conception of morality can be allowed to deny or exclude opposed points of view. Disagreement with the practices and beliefs of others, while certainly permissible and perhaps inevitable in a pluralist society, does not justify denying others the opportunity for their views to be represented, or refusing to acknowledge their existence. Whatever the personal views of the Board members might have been, their responsibility to carry out their public duties in accordance with strictly secular and nonsectarian principles included an obligation to avoid making policy decisions on the basis of exclusionary beliefs. Section 76 does not prohibit decisions about schools governance that are informed by religious belief. The section is aimed at fostering tolerance and diversity of views, not at shutting religion out of the arena. It does not limit in any way the freedom of parents and Board members to adhere to a religious doctrine that condemns homosexuality but it does prohibit the translation of such doctrine into policy decisions by the Board, to the extent that they reflect a denial of the validity of other points of view.<sup>79</sup>

This was nonetheless a majority decision. In their dissenting opinion justices Gonthier and Bastarache based their analysis of the reasonableness of the School Board’s decision within both the local context as well as *School Act* requirements and *Charter* standards.

The privileged role of parents to determine what is in their children’s well- being, including their moral upbringing, and their right to raise their children in accordance with their conscience, religious or otherwise, is central to analyzing the reasonableness of the School Board’s decision. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being providing they act in accordance with the best interests of their children. This Court has reiterated the paramount parental role by construing the nature of the authority schools and teachers have over children as a delegated authority. The notion of a school’s authority being delegated, if it allows parents to remove their children from the public school system, must also guarantee to parents the role of having input with regard to the values which their children will receive in school. This is generally brought about by electing representatives to school boards who will develop consensus and govern on matters pertaining to public education. These local school boards are empowered by the School Act to approve or not approve complementary educational resource materials. They do not, however, have an unfettered discretion. They must act in a manner consistent with the School Act and the evaluation, selection criteria and procedures adopted by the Board. Here, the Board’s criteria for approving complementary educational resource materials contained reference to concepts such as “age-appropriateness” and envisaged that



the existence of parental concern in the community would be a factor to be considered.<sup>80</sup>

Justice Gonthier, for the minority, consequently concluded the Board's decision was indeed reasonable as it was well within its purview, consistent with its own policies, provincial law and Ministerial directions. He further observed that by "striking an acceptable balance and a position which is respectful of the views of both sides" the Board's decision was also consistent with the *Charter*.<sup>81</sup> The minority opinion further observed that whereas "the best interests of children includes education about 'tolerance', 'tolerance' ought not be employed as a cloak for the means of obliterating disagreement."<sup>82</sup>

From its earliest days British Columbia's school legislation adopted a non- sectarian emphasis that contrasted to the assumed partnership between school, family and church reflected in early school legislation in central and eastern Canada. As such, and because, once more, of the exclusive legislative powers over education accorded to Canadian provinces under Section 93 of the constitution, the Supreme Court's disposition of *Chamberlain* on administrative rather than Charter principles has had little immediate application outside of British Columbia. Even so, the more pragmatic approach taken in the dissenting analysis offers a tantalizingly plausible application of Charter standards to the parental, pedagogic and local governance concerns animating *Chamberlain*, the logic of which may yet have implications for the teaching of values nation-wide.

More recently the Supreme Court issued what will likely be the first of several rulings concerning Quebec's new *Ethics and Religious Culture* [ERC] course, which marks the current high water mark of the laicisation of schooling in the province. The course was developed in accord with the 1999 report of the *Task Force on the Place of Religion in Schools in Quebec*, more popularly known as the Proulx report, established to address religious curriculum legacies inherited from the confessional system. Although Quebec's state schools had been restructured along linguistic lines in 1998, the *Education Act* continued to extend parents the right to choose Catholic or Protestant religious instruction—or non- denominational moral education—for their children. Proulx recommended replacing these options with the compulsory "study of religions from a cultural perspective" in both elementary and secondary schools.<sup>83</sup> The ERC program of study<sup>84</sup> flowed directly from this recommendation and the Proulx Commission's accompanying reasoning. After several years of consultation and development the new curriculum became compulsory in all Quebec schools in 2008. The course seeks to provide non-preferential, solely descriptive accounts of the province's religious heritage structured around the two major themes of *Recognition of others* and *Pursuit of the common good*. Teachers are enjoined to be "discreet and respectful, and to not promote their own beliefs and points of view" in delivering the material.<sup>85</sup>

As may be imagined, the development and introduction of this ostensibly unbiased

approach to studying religion as a cultural phenomenon, albeit with due attention to the contributions of Catholicism and Protestantism to the history of Quebec, generated considerable controversy. Various groups organized protest marches and polls have shown public opinion to be deeply divided. Media reports suggest that some 1,700 parents sought official exemptions for their children. All such requests were denied. Indeed, the Minister of Education publicly announced that no exemptions would be allowed. Two Roman Catholic parents sought exemption for their children from their local school board on the grounds the ERC program would cause harm to their children and interfere with their obligation to pass on their religious beliefs. When this was refused they appealed to the Superior Court of Quebec which ruled participation in the ERC program did not violate their freedom of religion or conscience because they had been unable to demonstrate their children would suffer harm as a result of participating in the program. No fewer than eight additional parties were granted intervener status for the Supreme Court hearing, including the Canadian Civil Liberties Association and the Canadian Catholic School Trustees' Association. The court denied the appeal in two concurring

judgments, Justice Deschamps expressing the views of the majority, Justice LeBel those of the minority.<sup>86</sup>

Deschamps crisply concluded that the majority could find no error in the original denial of the appeal, concurring with the trial judge's assessment that the new program essentially presents different religions and encourages pupils to talk about the themes of recognition and the common good, declaring this is not "in itself an indoctrination of students that would infringe the appellants' freedom of religion."<sup>87</sup> She then went on to consider the appellants' concern that exposing children to various religions is confusing, especially when differing beliefs are presented "on an equal footing."<sup>88</sup> In response she observed

Parents are free to pass their personal beliefs on to their children if they so wish. However, the early exposure of children to realities that differ from those in their immediate family environment is a fact of life in society. The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education. Although such exposure can be a source of friction, it does not in itself constitute an infringement of s. 2(a) of the *Canadian Charter* and of s. 3 of the *Quebec Charter*.<sup>89</sup>

Justice LeBel was more guarded in his presentation of the concurring minority view, noting that "The evidence concerning the teaching methods and content and the spirit in which the program is taught has remained sketchy."<sup>90</sup> Given this, LeBel concluded it was not possible to decide whether the ERC program will enrich student's knowledge of diversity and build respect for differences, or whether it is "an educational tool designed to get religion out of children's heads by taking an essentially agnostic or atheistic

approach that denies any theoretical validity to the religious experience and religious values.”<sup>91</sup> Consequently he was “unable to conclude that the program and its implementation could not, in the future, possibly infringe the rights granted to the appellants and persons in the same situation,”<sup>92</sup> leaving the door wide open for future, better grounded, legal challenges.

Drawing on the 2004 Supreme Court’s ruling in *Syndicat Northcrest v. Amselem*, Deschamps and LeBel both provided clear guidance on the standard required for any such challenges to succeed. To establish that the ERC program or any other law, policy or action violates freedom of religion under the Canadian *Charters*, claimants will have to demonstrate significant interference with a sincerely held religious belief which carries an obligation to engage in a religious practice, such as parental commitment to induct their children into their faith. The justices made it clear that while the standard for determining a religious belief is essentially subjective, the standard for showing interference with the practice of that belief must necessarily be objective, the onus being on a claimant to prove, on the balance of probabilities, state interference with their religious obligation. The justices did not doubt the sincerity of the parents’ religious beliefs in *S.L.v. Commission scolaire des Chênes*, but they could find no evidence that the ERC program had infringed on their right to educate their children in their faith.

As outlined earlier, Quebec’s private schools are required to conform to provincial curriculum requirements, including the *Ethics and Religious Culture* program. This obviously creates difficulties for the many religious private schools, not the least of which is the expectation that teachers will refrain from promoting their own beliefs. Loyola High School, a long established boy’s private Catholic school in Montreal, sought to substitute its own locally developed course that approached the ERC material from a Roman Catholic perspective. When permission was denied the school sought a legal remedy. This was obtained in June 2010 when Justice Gerard Dugre of Quebec’s Superior Court found the Minister of education had erred when ruling Loyola’s locally developed course was not equivalent to the ERC program.<sup>93</sup> Dugre further found the imposition of the ERC curriculum violated the school’s freedom of religion under Quebec’s *Charter of Rights and Freedoms*. More colourfully and pointedly Dugre concluded his extensive analysis by observing that “the obligation imposed on Loyola to teach the ERC course in a secular manner is totalitarian in nature and essentially tantamount to the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus.”<sup>94</sup>

In his judgement Dugre carefully separated this case from *S.L.* as discussed earlier, stipulating the central issue in *Loyola* as being a clash between the desire of the Minister of Education to have the ERC course taught “in a lay manner” and the obligation of Loyola to “teach it in a denominational manner so that the school complies with the precepts of the Catholic religion that governs it and that it has applied since it was founded in 1848.”<sup>95</sup> The immediate issue was the Minister’s refusal to grant Loyola an exemption from following the ERC program of studies as allowed under Regulation. Justice Dugre

disposed of this through a detailed analysis of applicable administrative law principles that led him to conclude the Minister had exceeded her jurisdiction and Loyola was entitled to the exemption on the grounds that its locally developed program was equivalent to the provincially prescribed program of studies. On the trial judge's analysis "The teaching of the Loyola's program in accordance with the Catholic faith does not change its nature or make it lose its status as an equivalent program."<sup>96</sup> On the freedom of religion question Dugre applied the two-point test used *Amselem* as outlined above. On the first question of holding a sincere religious belief the trial judge held there was clear and unequivocal evidence that Loyola's officials, staff, parents and students believed the school must "teach the ERC with its own program and according to the precepts of the Catholic religion."<sup>97</sup> On the second question of interference, the improper refusal of the Minister to grant the requested and lawful exemption obviously satisfied the required objective standard. As observed by Dugre, "The fundamental principles of the Quebec *Charter* are aimed precisely at protecting people from such interference and such coercion by the law or an act of an administrative decision maker who derives his or her power from the law."<sup>98</sup> So too, of course, for the Canadian *Charter*, even though the trial judge had delimited his consideration to the Quebec *Charter*. Quebec has appealed this decision. Oral arguments before the Quebec Court of Appeal are scheduled for 7 May 2012.

## Envoi

Choice, accountability and, to a more variable extent, autonomy in schooling have been increasing in those provinces west of Ontario—the younger, energetic, economically optimistic future heartland of the country. Canadians living east of Quebec have experienced little change to the quite limited school choices made available by provincial governments, although the situation in Nova Scotia is not as bleak. In particular, Newfoundland and Labrador's rush to supplant its denominational schools with a modernized, non-sectarian, centralized system in the name of all the usual vaunting promises of equity and social justice have cast a stifling blanket over parental freedom and school autonomy, at least for the present. Similar regressions are evident in Quebec, although the resilience of religious and anglophone communities has arguably strengthened many non-public schools in some respects. The pressing future threats to freedom and autonomy in Quebec education flow from the governing establishment's seemingly blind commitment to its laicization project. In this respect the final disposition of the *Loyola* case will be of overwhelming importance for all the issues animating these volumes. Should the Supreme Court of Canada eventually rule on the *Charter* issues inherent in this case, the decision may also bear heavily on Ontario politics and school policy. Currently, the Canadian province with the largest population and largest share of the national GDP appears paralyzed by the challenges and promises inherent in enhanced school

choice, autonomy and accountability, remaining sleepily content with the most unsupportive and uninterested policies toward non-public schools in the entire country, although its official stance on homeschooling is more enlightened. Despite the crushing logic and humiliation of the United Nations ruling condemning the province's refusal to provide even token financial support for parents choosing faith schools other than the separate schools created in and for another age and set of political circumstances, Ontario's current governing elites remain stubbornly committed to the *status quo*, with public opinion divided and confused. Yet innovative educational models abound in this country and it may well only be a matter of time before this province embraces what its younger siblings have found to be the way forward on the road to respecting difference, embracing diversity, and improving choice, accountability and autonomy.



## *Endnotes*

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<sup>1</sup> Simeon & Robinson, 1990

<sup>2</sup> Holmes, 1998, p. 40

<sup>3</sup> Statistics Canada, personal communication, 3 March 2011

<sup>4</sup> Kandel, 1933, pp. 215-218

<sup>5</sup> CUP, 2004, pp. 29-59

<sup>6</sup> Statistics Canada, 2001, p. 2, & Quebec, 2008a, p. 140

<sup>7</sup> Morsink, 1999

<sup>8</sup> *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995], p. 5-6

<sup>9</sup> Hammer, 2011

<sup>10</sup> Holmes, 1998, p. 201

<sup>11</sup> *Ibid.*, p. 83

<sup>12</sup> Quebec, 2006

<sup>13</sup> Statistics Canada, 2001, p. 2 & Quebec, 2008a, p. 140

<sup>14</sup> British Columbia Royal Commission on Education, 1988, p. 250

<sup>15</sup> *Ibid.*, p. 207

<sup>16</sup> *Independent School Act* of 1989, Section 1(1)

<sup>17</sup> *Ibid.*, Schedule 1(a)

<sup>18</sup> *Ibid.*, Section 1(1)

<sup>19</sup> Statistics Canada, 2001, p. 2, & British Columbia, 2011, p. 1

<sup>20</sup> British Columbia Ministry of Education, 2011, p. 4

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- <sup>21</sup> Barman, 1991, p. 17
- <sup>22</sup> Manitoba, 2011 & Statistics Canada, 2001
- <sup>23</sup> *Education Administration Act* , Section 1
- <sup>24</sup> Manitoba Reg. 267/97, 14(2)
- <sup>25</sup> personal communication, 3 March 2011
- <sup>26</sup> Education Act, Section 3(1)(x)
- <sup>27</sup> *Ibid.*, Section 131(3)
- <sup>28</sup> Prince Edward Island, 2010, Section 4
- <sup>29</sup> North West Territories *Education Act*, Section 11(1)
- <sup>30</sup> personal correspondence & Statistics Canada, 2001, p. 2
- <sup>31</sup> Bernard Shapiro, 1985, p. 42
- <sup>32</sup> PPM 131
- <sup>33</sup> Smith, 1996, pg. 1
- <sup>34</sup> personal communication, 28 December 2011
- <sup>35</sup> British Columbia, 2011, p. 1 & 30
- <sup>36</sup> Davis, 1984, p. 76
- <sup>37</sup> Shapiro, 1985, p. 49
- <sup>38</sup> *Ibid.*, p. 51
- <sup>39</sup> *Ibid.*, p. 53
- <sup>40</sup> *Adler*, 1996, p. 4

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<sup>41</sup> *Ibid.*, p.12 & 14

<sup>42</sup> United Nations, 1999

<sup>43</sup> *Ibid.*, para. 1.3.1

<sup>44</sup> *Ibid.*, para. 4.4.3

<sup>45</sup> *Ibid.*, para. 10.5

<sup>46</sup> *Ibid.*, para. 10.6

<sup>47</sup> *Ibid.*, para. 12

<sup>48</sup> personal communication, January 2011

<sup>49</sup> United Nations, 2006, p. 6

<sup>50</sup> Saskatchewan, 2011

<sup>51</sup> Alberta, 2011

<sup>52</sup> *Ibid.*, p. 1

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, p. 18

<sup>55</sup> *Ibid.*, p. 2

<sup>56</sup> *Ibid.*, p. 2

<sup>57</sup> *Ibid.*, p. 2

<sup>58</sup> Bosetii, 2011, p. 116

<sup>59</sup> Hansard, Monday, May 4, 1992

<sup>60</sup> Lefebvre & Merrigan, 2009, p. 6

<sup>61</sup> Quebec, 2009, p. 18

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<sup>62</sup> Lefebvre & Merrigan, 2009, Table 2, p. 19

<sup>63</sup> *Ibid.*, p. 6

<sup>64</sup> Magnuson, 1993, p. 5

<sup>65</sup> *Charter of Human Rights and Freedoms*, Section 23(3)(a)

<sup>66</sup> *Mahé v. Alberta*, p. 4-5

<sup>67</sup> *Arsenault-Cameron*, p. 4

<sup>68</sup> McMahon, 28 July 2011

<sup>69</sup> Independent Schools Policy Manual, 1991, p. i

<sup>70</sup> see CUP Research Team, 2004

<sup>71</sup> Robson & Hepburn, 2002, p. 29

<sup>72</sup> *Caldwell et al. v. Stuart et al.*, 1984, p. 619-20

<sup>73</sup> Hiemstra, 2001, p. 14

<sup>74</sup> Holmes, 1998, p. 142-43

<sup>75</sup> *Ibid.*, p. 240

<sup>76</sup> *Ibid.*, p. 85

<sup>77</sup> *Chamberlain*, p. 3

<sup>78</sup> *Ibid.*, p. 4

<sup>79</sup> *Ibid.*, p. 5-6

<sup>80</sup> *Ibid.*, p. 8-9

<sup>81</sup> *Ibid.*, p. 10

<sup>82</sup> *Ibid.*, p. 10

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<sup>83</sup> Quebec, 1999, p. 222

<sup>84</sup> Quebec, 2008b, 2008c

<sup>85</sup> Quebec, 2008b, p. 28

<sup>86</sup> *S.L. v. Commission scolaire des Chênes*, 2012

<sup>87</sup> *ibid.*, para. 37

<sup>88</sup> *Ibid.*, para. 38

<sup>89</sup> *Ibid.*, para. 40

<sup>90</sup> *Ibid.*, para. 57

<sup>91</sup> *Ibid.*, para. 53

<sup>92</sup> *Ibid.*, para. 58

<sup>93</sup> *Loyola High School v. Courchesne*

<sup>94</sup> *Ibid.*, para. 331

<sup>95</sup> *Ibid.*, para. 15(i)

<sup>96</sup> *Ibid.*, para. 182

<sup>97</sup> *Ibid.*, para. 265

<sup>98</sup> *Ibid.*, para. 272



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